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INTRODUCTION

The year 2004 marked the fiftieth anniversary of *Brown v. the Topeka Board of Education.*[1] Less noticed and covered is the fortieth anniversary of the federal Civil Rights Act of 1964.

Both landmark policies, one judicial and one legislative, forever changed the landscape and opportunity structures for blacks and other minority groups in America. Yet as far-reaching as both policies have been, there remain enduring problems of race, public policy, and upward mobility. Let us be clear here. These are not the dark days when racial chauvinism dictated separate eating and drinking facilities. This also is not the America in which blacks were routinely intimidated when going to the polls. This is an America where black "firsts" now seem almost routine. The recent confirmation hearings for Condoleezza Rice as secretary of state brought few questions of race and competence; rather, the questions focused, quite rightly, on her views on international affairs. Could this have been imagined fifty years ago, even thirty years ago? No right-thinking person can say yes.

Many problems have receded, but far too many remain. Poverty has now become concentrated in many black communities, with predictable results: high crime, problematic health care, and limited job opportunities. The community development efforts of a generation past, which included self-help initiatives and workforce development programs, seem unable to cope with intractable urban and rural poverty. Part of the problem has been the limited success of public policy in deconcentrating poverty. The confluence of the changing economy, which has left high unemployment and concentrated poverty in its wake, and the less-than-strong national and local enforcement of fair housing laws has rightly caused debates about desegregation as a public policy goal to resurface.

Poverty has now become concentrated in many black communities, with predictable results: high crime, problematic health care, and limited job opportunities.

Reflecting less than a significant movement but more than a drumbeat, a number of observers, from different communities, are calling for a new discussion of residential desegregation as a policy option for alleviating poverty. The calls for a new look have not yet brought out the arguments and forces that removed the subject from the public-policy attention cycle some years ago. These issues included

- white resistance (why should one group be forced to live with another group?);
- minority resistance (it is patronizing to believe that minority problems can only be solved by integration);
- the diminution of minority voting power by racial integration;
- minority concern that voting power would be diminished through racial integration.

It would be foolish to believe that these sentiments are no longer in force. Time has probably not diminished opposition to desegregation. Those who believe in desegregation as a policy tool need to rethink its real world application. It is hard to believe that there is a national or state appetite for busing as a way to achieve desegregation, nor are simple laws to "open the suburbs" viable. Fair housing laws (and in the case of New Jersey, *Mt. Laurel*) have been on the books for a generation, and the results have been circumspect. New Jersey's urban communities remain some of the most segregated in the nation.

There are no easy answers, but the fact that much of New Jersey's growing economic activity lies outside the state's urban areas leaves little choice but to consider efforts that promote moving-to-opportunity policies—including some level of affordable housing near or in job-rich communities.

Proponents of desegregation will have to decide if new packaging is in order. Do we need to promote public policies and resources to encourage employer-assisted housing, institute incentive-based policies such as programs that ensure against loss of home values if minorities move to a community, and rethink the "stick" (regulation and court mandates) approach? This discussion is just beginning in New Jersey.

Ironically, the policy discussion regarding deconcentration and desegregation gained increased prominence as a result of a court case challenging federal allocations of

the Low-Income Housing Tax Credit (LIHTC)—a program that uses market incentives to promote affordable housing and community revitalization—on grounds that they violate existing fair housing laws. Two articles in this year's report examine the underlying issues in this court case, which has national implications.

The evidence is strong that the Low-Income Housing Tax Credit program has been the primary tool used by nonprofit community development organizations to rehabilitate and develop new housing. In fact, the LIHTC has been so successful that many observers, citing the need for programs to build the skills of and job opportunities for residents of low-income communities, have bemoaned the fact that nonprofit development corporations have become predominantly housing developers.

This is not the argument of those initiating the court case. In their estimation, the New Jersey Housing and Mortgage Finance Agency has allocated much of its tax credits to rehabilitating and building housing in urban areas. HMFA does not have an official HMFA screen or encouragement to use LIHTCs to build in suburban communities. Such a policy or non-policy is prima facie both a violation of fair housing laws and a contributor to segregation.

The argument is not without merit—though it is difficult to disentangle causation and correlation here. We leave readers to make their own judgment after reading the Zimmerman and Walsh articles. What we will say is that those interested in deconcentration through a focus on the tax credit should take care. This is a literal reading of the fair housing law. What happens if the New Jersey program is forced to spread the tax credit on a nonurban basis? There is a great chance that that would set a precedent for diminution of the program in New Jersey and across the country. The result will be one less arrow in the quiver of community developers in the nonprofit sector, and, increasingly, in the private sector.

It is a cliché to say that one can win the battle and lose the war, but at a time when the LIHTC is the only federal neighborhood policy of much consequence, there is a clear responsibility to think strategically about the opening gambit for a new discussion of deconcentrating urban poverty. Winning the battle could mean pitting those in black and brown communities who believe in place development while pursuing policies that allow for moving to opportunity in job-rich sites against those who have a strict view of how to enforce fair housing laws.

This looming struggle takes away from an important opportunity to reexamine deconcentration policies in innovative ways—some of which are described by the Siena article—and to continue battles against important problems such as predatory lending (see Crowder and Gallinar). Even as we encourage innovative ways to help foster moving-to-opportunity policies, there remains a very important role for those who enforce the law in distressed places. Our interview with New Jersey's current attorney general reminds us that community development is impossible without enforcing the rules of the game—whether those are laws against predatory lending, anti-gang laws, or code enforcement.

We hope that this NJPPRI report lifts up a number of complex challenges that need further examination and action. These challenges are not going away anytime soon; what we all can demand is rigorous definition of those challenges and clear-eyed approaches to policies that can help manage these challenges.

NOTE

1. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

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RACIAL SEGREGATION AND THE LOW-INCOME HOUSING TAX CREDIT PROGRAM IN NEW JERSEY

Kevin D. Walsh, Esq.

New Jersey's schools and neighborhoods are among the most racially and economically segregated in the nation. Despite the existence of state and federal laws that require the state of New Jersey to promote integration in our schools and communities, New Jersey's official housing policy for decades has been to ignore the state's racial and economic polarization and to fund affordable housing development in neighborhoods where lower-income New Jerseyans already live. As a result, housing in New Jersey that is affordable, especially for families, is in the most troubled and segregated neighborhoods. And children who live in that housing attend the most troubled and segregated schools.

In litigation pending before the New Jersey judiciary, the Southern Burlington and Camden County branches of the NAACP, plaintiffs in the seminal *Mount Laurel* case, and others are challenging this state of affairs. Those parties maintain that the decision of the New Jersey Housing and Mortgage Finance Agency (HMFA) to ignore the segregative effects of its allocations of federal low-income housing tax credits violates state and federal civil rights laws.[1] They contend that whereas the original *Mount Laurel* case focused on discriminatory zoning by a suburban municipality, today's housing discrimination also comes in the form of discriminatory funding of the type practiced by HMFA. But the effect is the same: housing for lower-income New Jerseyans is being built and is available, if at all, in places that are disconnected from the high-opportunity suburbs.

HMFA has claimed in its defense that promoting racial integration by funding housing that will result in integrated housing opportunities for people of color is unconstitutional. Its argument is that it cannot consider the segregative impact of its funding decisions because "evolving discrimination law severely restricts race conscious governmental efforts to integrate."[2] Boiled down to its essentials, HMFA's argument is that promoting integration is legally the same as hanging a "Whites Only" sign on the door of an apartment building in a wealthy suburban municipality. HMFA likens the decision to promote integration, as required by state and federal civil rights laws, to the decision to discriminate on the basis of race in a nefarious manner. In HMFA's view, all race-conscious action is presumptively unconstitutional.

HMFA's position is a startling one that is more oppositional to the use of race for a salutary end than the Bush administration's position on affirmative action in the 2003 University of Michigan case. Although racial integration has been removed from the fore of our state and national policy agendas, laws prohibiting race-blind efforts that result in segregation are very much alive and enforceable. New Jersey's elected officials and policymakers, more than those of any other state, are required by explicit provisions of our state constitution, our statutes, and decisions of the state supreme court to consider race.

If our civil rights laws mean anything, the state of New Jersey will soon be ordered to create racially integrative housing opportunities. Fifty-seven years after our state constitution prohibited segregation in our public schools, fifty years after *Brown v. Board of Education*,[3] thirty-six years after the passage of the Civil Rights Act of 1968, and almost three decades after the New Jersey Supreme Court recognized the *Mount Laurel* doctrine, the issue of whether a state can act in a manner that plainly perpetuates racial and economic segregation and that disadvantages people of color is again before a court.

This article focuses on the state constitutional aspects of the tax credit litigation. Specifically, this article explores the significance of the *Mount Laurel* doctrine and the state constitutional provision that prohibits racially segregated schools, both of which HMFA contends are irrelevant to its administration of the tax credit program.

Racial and Economic Segregation in New Jersey

New Jersey's communities are among the most segregated in a nation that itself is intensely segregated.[4] Our state Development and Redevelopment Plan reports that "[t]wo out of three African American and Hispanic households live in only 25 municipalities, and 60 percent of all African American and Hispanic households live in cities where they constitute a majority of the population. In contrast, there are over 300 municipalities with virtually no minority population."[5]

In Essex County, which has the highest percentage of African Americans of any county and is the most segregated, 80 percent of the population would have to move to equalize the distribution of people according to race.[6] The Newark metropolitan area is the nation's sixth most segregated region for blacks out of 331 metro areas.[7] The Camden area is 75 percent white, but fewer than one in ten of the city's residents were white in 2000. In 2000, "Camden had proportionally almost six times as many blacks and almost seven times as many Hispanics as its suburbs. Newark had proportionally almost three times as many blacks and almost four times as many Hispanics as its suburbs, and Trenton's multiples were five times and four times for blacks and Hispanics, respectively."[8]

Our public schools likewise are divided, often almost totally, along racial lines. In large part due to residential segregation, New Jersey's schools are among the most segregated in the nation for African American and Hispanic students.[9] Nationally, New Jersey has the fifth most segregated elementary schools for blacks and Hispanics. According to the New Jersey Department of Education, Camden's, Plainfield's, and Irvington's students are 99 percent racial minorities. Newark's students are 91 percent racial minorities. Union City's are 96 percent racial minorities, and New Brunswick's and East Orange's student bodies are both 97 percent racial minorities.

Racial segregation and concentrated poverty go hand in hand in New Jersey. New Jersey ranks first in its segregation of low-income pupils in schools, and those low-income students most often are children of color who attend troubled *Abbott* schools.[10] The combination of concentrated poverty and racial segregation is a phenomenon that affects only poor racial minorities, not poor whites. "Of the 39,000 poor whites in South Jersey in 1990, only 8 percent lived in poverty neighborhoods and only 3 percent lived in high-poverty neighborhoods (greater than 40 percent poverty). By contrast, of 27,000 poor blacks, 69 percent lived in poor ghettos and 34 percent lived in very high-poverty ghettos."[11]

In large part due to residential segregation, New Jersey's schools are among the most segregated in the nation for African American and Hispanic students.

The Effects of Racial and Economic Segregation

According Kenneth B. Clark, a prominent sociologist, "Racial segregation, like all other forms of cruelty and tyranny, debases all human beings—those who are its victims, those who victimize, and in quite subtle ways those who are mere accessories."[12] Although a hypersegregated society impacts negatively all of its members, the victims of the segregation, those trapped in the ghettos, appear to bear the brunt of the harm.

Indeed, racial segregation and the concentrated poverty that almost always accompanies it impacts virtually every aspect of the lives of people who cannot escape the segregation. Segregation interferes with long-term wealth accumulation by blacks. For most Americans, accumulated wealth comes primarily through homeownership.[13] "For wealth to be created, and homeownership to be a means of accessing other opportunity structures, homes must be located in economically vibrant areas. Not only is it less likely that blacks will own their homes, but white flight and residential segregation render their properties less valuable than those in nonblack neighborhoods."[14] The decline in the value of houses in segregated communities, what has been called the "segregation tax," results in a net reduction in housing value for no reason other than the segregation.[15]

According to research by William Beckler, a community organizer and researcher with the New Jersey Regional Coalition, the disparity in black and white home values is especially acute in New Jersey. The home value of the one million most segregated racial minorities[16] is significantly less than that of the one million most segregated whites. The total value of these minority homes is $11.3 billion, the total value of homes in the predominantly white communities is $83.2 billion. In addition to the long-term negative impact, homeowners in municipalities in which racial minorities are segregated annually pay property taxes at a rate of 60 percent more than

their white-segregated counterparts. Thus, while their most important asset is underperforming relative to the homes of whites, people of color in New Jersey fall victim to regressive property tax policies.

Segregation in housing also interferes with access to good employment opportunities. The physical distance between jobs and housing limits the chance that racial minorities will even know about a job opportunity. "Besides the physical problem of simply getting to jobs, place matters because neighborhoods link residents into networks that provide them with crucial information about jobs. More than half of all jobs are found through friends and relatives, not through the want ads. These networks provide information not just to people for jobs but also to employers looking for good workers."[17]

The problem of "spatial mismatch" is especially pronounced in New Jersey. As a result of pervasive residential segregation, twelve municipalities account for more than half of New Jersey's affordable housing stock while accounting for only 14 percent of the state's households. Meanwhile, the communities with most of the job growth have little or no affordable housing. Between 1990 and 1999, 46 municipalities gained 2,000 or more private-sector jobs, accounting for a quarter of the total statewide employment in 1999. Those municipalities, however, have only 15.7 percent of the state's affordable housing stock. The disparity becomes even starker if Jersey City is discounted: the remaining 45 municipalities accounted for 22.3 percent of employment but only 8.4 percent of New Jersey's affordable housing.[18]

The poverty that is generated and sustained by residential segregation also fosters crime and violence. Douglas S. Massey suggested:

> [S]egregation interacts with rising black poverty to concentrate poverty geographically, which in turn concentrates crime, thus creating an ecological niche characterized by a high level of violence and a high risk of victimization. The concentration of crime is brought about by just two conditions that we know to have characterized U.S. metropolitan areas during the 1970s and 1980s: high levels of racial segregation and rising rates of black poverty. Given the correlation between poverty and crime, the concentration of crime follows axiomatically from these structural conditions: no other outcome is possible. The ecological niche created by racial segregation and high black poverty defines the social environment to which poor blacks must adapt.[19]

Children living in segregated minority neighborhoods and attending schools with other children of color are perhaps most profoundly impacted by segregation. Gary Orfield and Susan E. Eaton stated:

> The concentration of minority and low-income students in low-performing schools creates a vicious cycle of failure, as these students have little exposure to the culture of achievement that characterizes many suburban schools. Being in a school with a high fraction of the students performing well makes a great deal of difference for teachers who need a critical mass of reasonably prepared students to operate demanding classes successfully, particularly in the upper grades. Low-income and minority students rarely have these opportunities. In fact, because of the resulting wide discrepancy in course content and grading standards between high-poverty and suburban schools, the segregated students often have no realistic conception of what standards they need to meet if they go on to higher education.[20]

Poverty concentrations in schools also result in negative outcomes. A recent report by the Century Foundation found that "[t]here are no high-poverty school districts that perform at high levels....Indeed, one reason that intergenerational white poverty is less prevalent than intergenerational black poverty is that poor, white children are much more likely than poor, African American children to live in middle-class neighborhoods and attend good schools."[21]

The Recognition of The Mount Laurel Doctrine

New Jersey is home to "two societies, one black, one white—separate and unequal."[22] That phrase, written by the Kerner Commission in 1968 to warn of what would come if an integrationist agenda was not adopted as a national policy, accurately describes New Jersey today. The Kerner Commission, in its report, and its New Jer-

sey counterpart, the Governor's Select Commission on Civil Disorders, in its 1968 *Report for Action*, identified racial segregation as a root cause of the riots in Newark in July 1967.

Both commissions identified regional affordable housing outside urban centers as essential to prevent urban strife. The Governor's Select Commission wrote:

> As development proceeds in the city core, planning must go ahead in the metropolitan context for a more deliberate approach to integrated housing throughout the area. This may have to include incentives to the present suburban populations to make them more amenable to integrated patterns of living. Because this is a problem transcending city boundaries—indeed it is a predicament of national scope—*the State Government is more equipped than any one municipality to grapple with it.*

Although the Kerner Commission and the Governor's Select Commission were advisory bodies, their 1968 recommendations for preventing urban riots would inspire New Jersey Supreme Court justices several years later and lead them to develop an economic remedy to social problems with racial and economic causes. The *Mount Laurel* decisions, both of which relied on the commissions' findings to justify their holdings, are now recognized as bold moral statements regarding the formation of communities.

The *Mount Laurel* doctrine was the product of suburban exclusion and the resulting concentration of poverty and segregation in New Jersey's cities. The smoke from the riots in Newark in 1967 and in Camden in 1971 may have cleared from the sky, but it was still strong in the memories of New Jerseyans in the years that followed. During that time, suburbia welcomed white urban dwellers while excluding their black neighbors.

In 1975, after several years of litigation, the state supreme court issued the *Mount Laurel I* decision, which required all municipalities to provide their fair share for the region's need of affordable housing, both those in the cities and lower-income residents already in the suburbs who were in danger of being forced to leave. After the decision, municipalities dug their heels in, declining to comply with the court's directions.

Faced with a state that widely sanctioned exclusionary zoning, the court returned to first principles in writing in issuing the *Mount Laurel II* decision in 1983. Chief Justice Wilentz wrote that "[w]hile the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated." He continued:

> The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.[23]

Chief Justice Wilentz recognized that in 1983 "this unpleasant 'vision' is to a large extent already with us, as can be seen by comparing the poverty and decay of Newark and Camden with the prosperity of many of their suburban neighbors."[24] He cited the Kerner Commission Report for the proposition that suburban exclusion is one of the "principal causes making America 'two societies, one black, one white—separate and unequal.'"[25] Chief Justice Wilentz additionally cited New Jersey's 1968 *Report for Action* of the Governor's Select Commission in addressing "the relationship between ending exclusionary zoning and the revitalization of our inner cities."

As the times in which it was born in 1975 reflect, and as explicitly recognized in the *Mount Laurel* decisions, the *Mount Laurel* doctrine is intended to remedy problems with economic and racial origins by permitting low- and

moderate-income New Jerseyans to move throughout the region, to enjoy the same public benefits of their wealthier, and often white, peers. The supreme court intended to require the state, through its municipalities, not just to provide opportunities for affordable shelter but also to provide shelter in a manner that is linked to opportunity and that is better for all of New Jersey. That is a policy born in a moral judgment that exclusion of the poor, who often are people of color, is wrong and that living together is better than living divided.

The State Constitutional Prohibition of Racial Segregation in Our Public Schools

The *Mount Laurel* doctrine is not addressed explicitly in our state constitution. Rather, "[t]he doctrine is a corollary of the constitutional obligation to zone only in furtherance of the general welfare,"[15] reasoning that draws charges of judicial activism. The state supreme court simply looked at the racial and economic polarization of our state, which was in part the result of our zoning laws, did not like what it saw, and created a constitutional right to not be excluded from regional opportunities and a constitutional remedy.

By contrast, the requirement that the state of New Jersey provide racially integrated public schools, the other law that is the subject of this article, is addressed explicitly in our state constitution, which states that "no person shall be segregated in the public schools because of race."[16] By comparison to the *Mount Laurel* doctrine, which is frequently relied on in lawsuits against recalcitrant municipalities, the proscription of racially segregated schools is rarely the subject of litigation.

At its core, the school-integration provision recognizes that separate conditions will never be equal. In *Booker v. Board of Education of Plainfield*, a 1965 decision,[17] the supreme court wrote that "[i]n a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multicultural communities and the earlier they do so the better."[18]

In 1993, Virginia Long, then a judge, now a state supreme court justice, wrote that "the promise of *Brown [v. Board of Education]* for a society partially healed by the opportunities it engendered has been sorely tested. In these circumstances, the principle enunciated in *Booker* is more [a]llowed than ever: when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the mainstream of human affairs."[18]

Like *Mount Laurel*, the school-integration provision of our state constitution, which was included in our constitution in 1947, years before the U.S. Supreme Court addressed the issue, provides regional solutions to a problem that caused by regional forces. The Court has held "that governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies" such as those embodied in the school-integration provision of our constitution.

Unlike the federal constitution, which generally does not require school districts to go beyond municipal boundaries, de facto segregation is unlawful in New Jersey, at least in theory, because, the court has written, "while such feeling and denial [caused by racial segregation] may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting."[19]

The school-integration provision is one that, although never the subject of a housing discrimination case, is ripe for consideration in that role when it is ignored by a state agency that funds housing. Indeed, the *Booker* court looked to the enforcement of civil rights laws in the field of housing to remedy the apartheid in our schools, stating: "It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem."[20]

That optimism and common sense approach to enforcing our civil rights laws is also the subject of the tax credit litigation against HMFA.

The Issues in The Civil Rights Challenge to HMFA's Tax Credit Regulations

Since the principles underlying the *Mount Laurel* doctrine were first articulated [illegible] with the support of sociological research and experience, have put a finer point on and articulated even more persuasively the reasons why racial and economic integration in our schools and communities should be on the top of the public agenda.

One such scholar is john a. powell, a lawyer, professor, and national leader in thinking on issues of race, housing, and law. Professor powell argues that the best measure of an affordable housing policy is whether the policy links the development of affordable housing to opportunity. Professor powell asserts that although "providing shelter is a vital function of housing, housing can mean much more than this. By its location and mix, it can enhance or impede access to other opportunity structures. Accessing stable, affordable housing in a vibrant area contributes greatly to improvements in other key life areas, such as employment, health, education, civic engagement, and wealth creation." Professor powell's opportunity-based model "suggests that the creation and preservation of affordable housing must be deliberately and intelligently connected on a regional scale to high-performing systems sustaining employment, necessary transportation infrastructure, childcare, and institutions that facilitate civic and political activity."[3] Professor powell notes further that high-performing schools are most often, as addressed above, racially and economically integrated schools.

Professor powell's approach, especially his focus on the benefits to the occupants of the housing, is foreign to New Jersey's housing policymakers. HMFA has long promoted the development of affordable housing in neighborhoods that already are home to almost exclusively lower-income households. HMFA proudly states that "the touchstone" of the tax credit program in New Jersey "is the verifiable housing need identified by municipalities themselves."[32] In other words, because few mayors in wealthy communities urge low income families to move into their municipalities, HMFA prefers to develop affordable housing for families in poor communities. And in New Jersey, communities with high rates of poverty, with few exceptions, also are segregated communities of color.

In practice, then, HMFA's preference impacts primarily lower-income families of color with children. According to research by Fair Share Housing Center, tax credit developments are much more likely to be built in communities in which the residents are isolated from poverty. Almost 80 percent of all tax credits used for family housing since 1987 has been allocated to 25 *Abbott* municipalities, those that most often have low-quality school systems, high unemployment, high crime rates, and, overall, a low degree of opportunity. Family tax credit housing is located primarily in neighborhoods that are intensely racially and economically segregated but within regions that are not poor and that are not racially impacted.

Senior tax credit developments, on the other hand, are much less likely to be built in troubled communities. Just 19 percent of tax credit awards for senior citizens have been allocated to *Abbott* municipalities. Comparatively, then, black and Hispanic children bear the brunt of HMFA's discrimination because senior developments are much less likely to be in municipalities that are poor and racially segregated.

By contrast to the informed, deliberate approach advocated by Professor powell for funding and siting affordable housing, HMFA appears to center its tax credit allocation process around criteria that are intended to deny opportunity to its residents, and especially to black and Hispanic families. HMFA's tax credit allocations in 2003 continue the practice of the previous fifteen years, investing the vast majority of funds in segregated and poor cities while neglecting to create substantial opportunity in the region. For instance, HMFA allocated $23.6 million for segregated urban development. Nine out of fourteen of the 2003 projects receiving tax credits were in census tracts with minority populations over 85 percent, and four of the eleven projects were in tracts with median incomes below $25,000. In addition, 506 family units will be built in municipalities with schools that already

are over 90 percent minority. Of the 743 family units that were funded in 2003, just 10 units in Phillipsburg (which is intensely poor) will be in school districts with students that are less than 79 percent minority.

Although HMFA contends it is free to fund housing without considering the segregative effects of the funding, HMFA also has claimed in its defense that it has "created a statistical incentive for suburban family projects" because applications for suburban projects for families are always granted.[35] Put simply, HMFA has asked the judiciary for forgiveness for its transgressions because it has incentivized [illegible] HMFA would argue that it cannot control where developers want to build and that it simply funds housing but does not choose where to build it.

HMFA's unwillingness to consider race and poverty concentrations as part of its funding process demonstrates that it has not done even half as much as it could do to link affordable housing with opportunity but instead is willingly perpetuating segregation on a massive scale. Through the lens of our state constitution, which has been interpreted to recognize the opportunities inherent in integration in our schools and communities, HMFA's laissez-faire approach to funding affordable housing and to tolerating segregation is decidedly unconstitutional.

Mount Laurel is intended to provide opportunity for the full range of lower-income persons to live in the region if they choose to do so. The doctrine is intended to deconcentrate poverty and racial segregation and to permit urban municipalities to catch their breath so they can recover. While it funds housing in a manner that goes against the spirit of the doctrine, HMFA maintains that it has no duty even to consider it or to evaluate whether its criteria complement or frustrate the regional need fair share computations required by *Mount Laurel*.

One aspect of HMFA's tax credit policies best demonstrates the degree to which it is purposely working contrary to *Mount Laurel*. The single largest method by which municipalities choose to comply with the *Mount Laurel* doctrine is inclusionary zoning. Under local zoning [illegible] private developers, in exchange for getting an increase in density (more units on the same piece of land), agree to develop 20 percent of the project as affordable housing. Unfortunately, that housing rarely is affordable to low-income residents and instead most often goes to moderate-income residents who already live in suburbia. HMFA could use tax credits to supplement the subsidy obtained through the increase in density so that lower-income residents from urban communities could move to suburbia. But HMFA outright refuses to use tax credit funding to do so. As a result, the single largest housing program in New Jersey is unavailable to assist with the primary source of affordable housing development in suburbia. With little effort, that policy could be changed by HMFA to permit *Mount Laurel* housing in suburbia to reach lower-income people of color, thus providing real opportunities for integration.

The school-integration provision, like the *Mount Laurel* doctrine, also has been interpreted to require the state to create regional solutions to entrenched segregation at a local level. The state must seek to remedy segregation in schools even if that segregation is not the result of official policy. HMFA, which has refused even to acknowledge in its legal papers that that provision exists, would, if forced to address it, presumably claim to have no obligation under it. And, indeed, HMFA, although [illegible] of the state, does not consider in its housing funding processes at any point whether its decision will have a segregative or integrative impact.

HMFA, again, could easily incorporate preferences for housing that is located in a school district that is not segregated with children of color and that provides a high-quality education. With affirmative marketing and targeting of low-income urban residents, the development of tax credit-funded family affordable housing in communities with good schools would have [illegible] impacts for children of color whose families seek such opportunities.

HMFA could change its ways and could promote integration, but the reality is that it consciously chooses not to do so. Despite the obligations imposed on it by our

state constitution, HMFA is viewed by policymakers not as a force for social change but as a force for urban revitalization. It views its mission as one of rebuilding communities that have few jobs, a declining tax base, poor schools, and high crime by rebuilding affordable housing in those communities.

HMFA has criticized the Southern Burlington and Camden County branches of the NAACP and Fair Share for demanding integrated regional solutions to our urban problems, writing that they are promoting disinvestment. HMFA maintains that its urban-focused affordable housing programs properly respond to need in place. In reply to demands for regional housing, HMFA asks, "What happens to the children of parents who do not want to move from the cities or who would have problems obtaining affordable suburban housing even if it were readily available? What happens to the parents themselves? If left behind in higher poverty stricken cities where Fair Share wants public investments like LIHTCs discouraged and/or eliminated, what would be their future and how would their future affect the cities in which they would remain?"[44]

Underlying HMFA's questions is the belief that its policies are helping urban New Jersey and helping urban New Jerseyans more than a regional, opportunity based policy would. But HMFA cannot support that contention statistically and has not attempted to do so. By any measure, HMFA's effort to revitalize urban New Jersey and ostensibly to do more than provide shelter has been a failure.

According to Professor powell and Professor Myron Orfield, who jointly filed an amicus curiae brief in the tax credit litigation, HMFA's policies have not helped achieve any of their stated goals. In their brief in this matter, the professors write:

> It does not seem unreasonable to claim that a new building could temporarily improve conditions in a desperately poor neighborhood with boarded up, abandoned housing—particularly if the building has some middle-income tenants. However, there is no real evidence to support this claim.
>
> Assuming for the sake of argument that LISC's claim about present revitalization is true, it ignores the larger and more important question of what happens a year or two—or even a month or two—after the construction is completed. It is likely that the deplorable conditions will return. They will return because of the persistent lack of opportunities created by social and racial segregation [illegible] cities in New Jersey have been receiving the lions share of affordable and subsidized housing, and they have been turning into some of the poorest cities in urban [illegible]
>
> What *is* clear is that any assumed improvement in the small general area surrounding new projects was quickly swallowed up in a sea of poverty. For fifty years, through urban renewal, Model Cities, [illegible] tax credits it is stunningly clear that bricks and mortar in the form of additional low income units are not the answer to the fundamental and overriding problems of segregation and concentrated poverty. Today the Robert Taylor Homes and their counterparts, and the endless pattern of low-income housing in poor neighborhoods, have created nothing more than a transitory change and more likely have deepened the profound social and racial isolation of New Jersey's and our nations poorest cities.

Achieving Racial and Economic Integration and Regional and Racial Justice Through Tax Credit Allocations

There is light at the end of the tunnel. Low-income people of color are interested in the opportunities that theoretically are required in the region, and New Jersey law is clear in requiring the state to promote racial and economic integration.

This article looks at just two of many relevant state and federal laws that are the subject of the tax credit litigation. In a contest of which constitutional protection, *Mount Laurel* or the integrated-schools provision, has been least successfully enforced, it is a close call: the poor are still concentrated, and apartheid is prevalent in our public schools. The tax credit litigation, however, provides a chance for the judiciary to require HMFA and the state overall to comply with both laws.

The state could begin complying with the law by providing more opportunities of the sort provided by Ethel R. Lawrence Homes, a family tax credit development in Mount Laurel that is the result of the original litigation against the township. Named after the lead individual plaintiff in the *Mount Laurel* litigation, an attendee of the church at which the mayor of Mount Laurel spoke, the 140-unit rental development was opened in 2001. The development provides social and recreational services and provides opportunities for very low-income families to live in a thriving, job-rich municipality. Some residents pay as little as $70 per month for new townhouses in a wooded, safe community. Most of the children in the development came from *Abbott* schools and now attend schools with very low poverty rates, highly skilled teachers, and safe, well-equipped classrooms.

In September 2002, with the last forty units nearing completion, 1,700 people, mostly from Camden and other nearby cities, came to apply, thus demonstrating that the phrase "build it and they will come" does apply to efforts to achieve regional equity and integration.

When Julian Bond spoke at the dedication of Ethel R. Lawrence Homes in August 2002, he said that the development "represents the culmination of a long battle waged by a true heroine, the NAACP and many, many others, to provide decent housing to all residents of New Jersey. While much remains yet to be done, these homes represent a great accomplishment."

He was right: he was on both counts. In the face of great resistance, providing affordable housing for very-low income people of color in a Mount Laurel is a great accomplishment that fulfills the goals of the civil rights movement, and that is consistent with the goals of our state constitution.

And much does remain to be done. In that spirit, the tax credit litigation will move forward.

NOTES

1. *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan*, N.J.A.C. 5:80-33.1–33.40, by the New Jersey Housing and Mortgage Finance Agency, docket no. A-000109-0313.

2. Ibid.

3. *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954).

4. New Jersey Public Policy Research Institute, *The State of Black New Jersey. Issues for a New Millennium 2002–2003*, NJPPRI, 2004, 6.

5. New Jersey State Development and Redevelopment Plan (March 1, 2001), 65 (available at http://www.state.nj.us/osp/).

6. Ibid.

7. David Rusk filed an expert report (the Rusk Report) in support of comments submitted by the Southern Burlington and Camden County branches of the NAACP and Fair Share Housing Center, in *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan*. The report is on file with the author.

8. Rusk Report at 17.

9. Gary Orfield, "Schools More Separate: Consequences of a Decade of Resegregation," 43–50, Harvard Civil Right Project, July 2001, available at http://www.law.harvard.edu/civilrights. ("The most segregated states for black students include the leaders for the last quarter century—Illinois, Michigan, New York and New Jersey" and "New York, Texas, New Jersey, Illinois and California have been centers of segregation for Latino students for some time. Each has more than 38% of all Latino students in schools with less than a tenth white pupils.")

10. Rusk Report at 32.

11. David Rusk, "Cities, Suburbs Win with Inside Game/Outside Game, New Jersey Future News," New Jersey Future, January/February 2000, available at www.njfuture.org)

12. Quoted in Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993), xi.

13. john a. powell, "Opportunity Based Housing," *Journal of Affordable Housing and Community Development Law* 12 (2003), 195–196.

14. Ibid., 196.

15. David Rusk, "The 'Segregation Tax': The Cost of Racial Segregation to Black Homeowners," The Brookings Institution Center on Urban and Metropolitan Policy, October 2001.

16. Consisting of the cities of Asbury Park, Atlantic City, Camden, East Orange, Englewood, Interlaken, Irvington, Lawnside, New Brunswick, Newark, Orange, Passaic, Paterson,

Perth Amboy, Plainfield, Pleasantville, Roselle, Trenton, Union City, West New York, and Willingboro "Property Tax for Most Segregated Million People," New Jersey Regional Coalition 2003 (on file with author)

17 Peter Dreier, John Mollenkopf, and Todd Swanstrom. *Place Matters. Metropolitics for the Twenty-First Century* (2001 , 60

18 Tim Evans, "'Realistic Opportunity'? The Distribution of Affordable Housing and Jobs in New Jersey," New Jersey Future, 2003 (available at www.njfuture.org)

19 Douglas S. Massey, "Getting Away with Murder: Segregation and Violent Crime in Urban America," 143 *University of Pennsylvania Law Review,* 1203, 1216 (1995).

20 Gary Orfield and Susan E. Eaton, *Dismantling Desegregation. The Quiet Reversal of Brown v. Board of Education,* 1996), 66

21 The Century Foundation Task Force on the Common School, *Divided We Fail: Coming Together Through Public School Choice* (2002), 13. Also see David Rusk, "Sprawl and Fair Housing. New Jersey's Unfinished Agenda," Annual Isadore Candeub Memorial Lecture in Planning, New Brunswick, N J (October 31, 2003), 5–6 (" Beginning with sociologist James Coleman's massive study Equality of Educational Opportunity (1966), researchers have consistently found that the biggest factor predicting success or failure in school is not expenditures per pupil, quality of school facilities, or even teacher qualifications, but who the kids are. More precisely, the key determinants are the socioeconomic status of a child's parents and of the child's classmates' parents. So important are fellow students, the report found, that "the social composition of the student body is more highly related to achievement, independent of the student's own social background, than is any school factor ")

22 Report of the National Advisory Commission on Civil Disorders, March 1, 1968

23 *Mount Laurel II*, 92 N J 158, 209–210 1983)

24 Ibid.

25. Ibid , 209

26 New Jersey Constitution of 1947, art. I, par. 5

27 45 N J 161, 170–171 (1965)

28 *Board of Education of Englewood Cliffs v. Board of Education of Englewood,* 257 N J Super 413, 464–465 (App. Div. 1992) aff'd 132 N J 327 (1993)

29 *Jenkins v. Morris School District,* 58 N J. 483, 497 (1971)

30 45 N J 161, 171

31 powell, "Opportunity Based Housing."

32. 34 New Jersey Register 2418 (2002)

33. 35 New Jersey Register 3298(b) (2003)

34. *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan,* N.J.A C 5 80-33.1 33-40, by the New Jersey Housing and Mortgage Finance Agency, docket no A 000109-03T3

35 Amici brief of Professors Myron Orfield and john powell, in *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan,* N J A C 5 80-33.1 33 40, by the New Jersey Housing and Mortgage Finance Agency, docket no. A-000109-03T3

THE LOW-INCOME HOUSING TAX CREDIT PROGRAM AND CIVIL RIGHTS LAW: UPDATING THE FIGHT FOR RESIDENTIAL INTEGRATION

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In 1968, the Kerner Commission threw down a gauntlet that continues to challenge and haunt those committed to urban areas' community revitalization, and racial justice. The Commission stated: "[F]ederal housing programs must be given a new thrust aimed at overcoming the prevailing pattern of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them." This was "fundamental" to its recommendations about how to respond to the violence and destruction that in the 1960s tore apart many American cities, including Newark.

What place this stark warning should play in the policies and programs of today is, in essence, the question posed by the current civil rights challenge to how the state of New Jersey allocates its share of the nation's largest and most significant lower-income housing development program, the Low-Income Housing Tax Credit (LIHTC) program. The consequences are highly significant since they concern the ground rules for a program that cost the federal government more than $3.5 billion in 1999 and has been responsible for the construction or rehabilitation of an estimated 750,000 units of housing nationwide since the program's inception in 1986.

[F]ederal housing programs must be given a new thrust aimed at overcoming the prevailing pattern of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into central-city ghettos.

In the following article, I attempt briefly both to explain the issues involved in the lawsuit and to set out certain principles and outstanding questions that I believe emerge from it. In doing so, I rely in significant respects on the legal briefs I have filed in my role as co-counsel to several nonprofit affordable housing, environmental, and civil rights groups that are appearing as amicus curiae in the matter.[1] These groups believe that there are critical legal issues of first impression that must be addressed by the courts in this matter, most specifically, whether the federal Fair Housing Act's pro-integration mandate and the state constitution's Mount Laurel doctrine apply to the state's allocation of the LIHTC.

Perhaps more importantly, however, the engagement of these groups leads to a series of broader policy and political questions. On a policy level, for example, these include how best to use the LIHTC to promote meaningful racial and economic integration, and how changes in the LIHTC program might leverage reform in other policies and programs. From a political perspective, it is clear that these issues involve a broad range of stakeholders, including many not traditionally engaged in or sensitive to fair housing or civil rights concerns. These range from Wall Street syndicators and for-profit housing developers to state and municipal governments, as well as nonprofit affordable housing developers and civil rights advocates. One question, therefore, is what steps can be taken to muster sufficient political support to maximize chances for success.

Ultimately, the Kerner Commission report provides a touchstone as we grapple with these issues. Shockingly, the level of racial and economic segregation in New Jersey, as in the nation as a whole, remains approximately the same as it was thirty-five years ago. At the same time, there have been significant developments in urban communities: they are now largely represented by political leadership of color, inhabited by diverse groups of minorities and significant numbers of new immigrants, and able to draw on new types of nonprofit agencies and revitalization tools unavailable a generation ago. As we grapple today with how to apply the Kerner Commission's still powerful and relevant warning in the context of the LIHTC and beyond, it is clear that we must be beginning to identify, let alone respond to, all the matters to be addressed. This article is offered as a small step in promoting that discussion.

The Litigation

Overview

The case captioned *In re Adoption of the 2003 Low-Income Housing Tax Credit Qualified Allocation Plan* is, at least in its general outlines, relatively straightforward with few contested basic facts. Of course, the merits of the various legal claims presented, and the significance of the policy implications of these legal standards, are an entirely different matter.

The essence of the case is a challenge by a South Jersey fair housing group, Fair Share Housing Center (Fair Share), and two local chapters of the NAACP (collectively known as Fair Share plaintiffs), who claim that the state of New Jersey has violated a broad array of federal and state constitutional and statutory standards by concentrating LIHTC resources in urban, racially concentrated areas. In doing so, plaintiffs rely on a range of academic and social policy experts, such as Gary Orfield and David Rusk,[4] who emphasize the negative consequences of reinforcement of residential racial segregation. The state of New Jersey vigorously contests the premise that federal or state law has been violated, asserting, in essence, that it is fulfilling—not violating—legal and programmatic standards by emphasizing development in urban areas. A diverse group of amici have joined the fray.[5]

Into this battle have entered four organizations representing more than one hundred groups committed to developing affordable housing, preserving the state's cities, and fighting for the rights of the state's minority communities (referred to hereinafter as the nonprofit amici).[6] Through joint friend of the court briefs, they have focused upon two elements: (1) that the tax credit program must abide by the federal Fair Housing Act's pro-integration mandate and the state constitution's Mount Laurel doctrine, and (2) that the application of these laws should lead to changes in the way LIHTC funds are distributed so that they further appropriately crafted urban revitalization efforts and increased suburban affordable housing development that promotes integration. These groups argue that racial and economic integration should be a major criterion in the allocation process but that this should not lead to all or even a disproportionate majority of LIHTC development in suburban areas.

In significant measure, these groups emphasized this position to differentiate their views from those of both the Fair Share plaintiffs and the state. On one hand, the nonprofit amici fundamentally disagreed with the state, which asserted that neither the federal Fair Housing Act nor the Mount Laurel doctrine applied to its LIHTC allocation. At the same time, these groups had substantial differences with the Fair Share plaintiffs who appeared to assert that the application of these and other legal standards precluded allotment of LIHTC resources to urban areas. The nonprofit amici's position was particularly important in light of a companion case that the Fair Share plaintiffs had filed against urban, but not suburban, developers who had received tax credits pursuant to the 2002 and 2003 Qualified Allocation Plan (QAP). Although ultimately settled, this companion action by the Fair Share plaintiffs sparked substantial press and industry reaction, including a perception by certain urban elected officials and others that the civil rights challenge to the LIHTC allocation was intended to halt urban development activity throughout the state.[7]

Background on LIHTC and New Jersey's Residential Segregation

New Jersey is one of the most racially and ethnically segregated places in the country. According to data from the 2000 census, the Newark metropolitan area is the fifth most segregated large metropolitan area in the nation for both African Americans and Latinos.[8] On a scale in which a value of 60 connotes very high levels of segregation, the Newark metropolitan area has a score of 80 and, perhaps more troublingly, has shown little change from 1980 when the area measured 83 on the index of dissimilarity.[9] As New Jersey Public Policy Research Institute's 2002–2003 report notes, the area experiences "what can only be termed hypersegregation . . . and what is especially alarming . . . is that the levels of hypersegregation remain fairly resistant."[10]

Legal Issues

It is in this context that the LIHTC program operates. By a considerable margin, the LIHTC program is New Jersey's largest funding program for the development of lower-income housing.[7] The state's inventory of projects financed by the LIHTC includes 380 tax credit developments containing more than 21,000 lower-income units.[8] In recent years, HMFA has distributed about $15 million worth of credits annually. Given the manner in which the credits leverage other investment and do so over a multiyear period, this translates into between $105 and $125 million of total equity investment each year.

In many respects, the structure of the LIHTC makes it particularly well suited (or vulnerable, depending upon one's perspective) to the type of searching examination of the state's policies and priorities provoked by this lawsuit. While the tax credits are created at the federal level and governed by a federal regulatory framework,[9] the HMFA and equivalent agencies in other states have significant flexibility to determine how and where to distribute the state's allocation. Each year, HMFA develops a QAP that sets forth specific criteria by which it will select competitively among the private developers who submit proposals for the available credits. The specifics of the QAP typically have considerable significance because the number of applications consistently exceeds the available credits.

It is not seriously disputed that HMFA has allocated the LIHTC resources so that urban areas have received the vast majority of those available for family housing. For LIHTC projects for the elderly, suburban areas receive a substantially greater share of the allocation. In 2002, for example, HMFA's allocation provided funding for 840 units in urban areas, of which 668 (80 percent) were family units, and 238 units in suburban areas, of which 139 (58 percent) were family units. In 2003, urban areas received all of the credits for family projects.[10]

There is more controversy concerning the extent to which HMFA has meaningfully encouraged economically or racially integrated housing. Especially over the past several years, HMFA has provided incentives for programs, most notably HOPE VI, which encourage some form of mixed-income development, at least within those lower-income households eligible for subsidized housing.[11] HMFA has also provided some incentives for projects that further Mount Laurel compliance, although these are largely overshadowed by other priorities. HMFA has paid less attention to racial integration both in individual projects and from a policy standpoint. Aside from a generic affirmative marketing requirement for projects with twenty-five or more units, HMFA has not attempted to promote racially integrated projects through its QAPs. Moreover, at least until this litigation was filed, HMFA had not sought information about the anticipated racial composition of projects or how the state's LIHTC policies or the presence of specific projects has exacerbated or ameliorated neighborhood racial or economic changes.

It is in this context that the legal issues involved in this case are to be decided. Although plaintiffs have raised a broad array of claims, ranging from assertions that HMFA's actions constitute intentional discrimination in violation of the Fourteenth Amendment or contravene state constitutional standards by furthering school segregation, the four affordable housing, environmental planning, and civil rights groups in their joint amicus briefs focus on just two legal issues: (1) the federal Fair Housing Act's pro-integration mandate, and (2) the state constitution's Mount Laurel doctrine.

The federal Fair Housing Act of 1968's requirement that all federal housing funds be used "in a manner affirmatively to further fair housing" is not necessarily widely known.[12] It is highly significant, however. As explained by Congress in passing the act and recognized by the many courts that have interpreted it over the past thirty-five years, this standard reflects a clear-cut recognition that government agencies must consider and promote the goal of housing integration when developing their housing policies and programs.[13] In brief, it stands for the premise that the consequences of decades of government complicity in maintaining residential segregation cannot be overcome simply by ending prohibited discrimination against individuals.[14]

Perhaps the most significant application of this provision involves the siting of public housing and other subsidized projects. As Congress recognized in enacting the "affirmatively furthering" requirement, by 1970 decades of formal governmental policies had led significant amounts of public housing to become, in the words of Douglas S. Massey and Nancy A. Denton, "black reservations, highly segregated from the rest of society and characterized by extreme social isolation."[21] The courts and subsequently HUD relied on the "affirmatively furthering" requirement to begin addressing this reality.

In the landmark decision of *Shannon v. HUD* authored by Judge Gibbons of the Third Circuit, the court found that the "affirmatively furthering" provision meant that HUD could not undertake urban revitalization decisions without assessing their potential for furthering racial segregation.[22] In doing so, the court emphasized the connection between sustained urban poverty and ongoing racial segregation. Judge Gibbons wrote: "Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increasing or maintaining racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."

In response to the decision, HUD promulgated regulations governing the siting of public and other federally supported housing that essentially prevent the siting of such projects in local areas that would further minority racial concentration unless sufficient comparable housing opportunities exist outside areas of such concentration or the project is necessary to meet overriding housing needs that could not be otherwise satisfied.[24]

Whether the "affirmatively furthering" provision of the Fair Housing Act applies to the LIHTC has never been tested in court anywhere in the country. Moreover, this issue has never been seriously examined by the federal or state agencies with responsibility for the program.[25] This is the starting point for the nonprofit amici. In their joint briefs, the four groups emphasize that the "affirmatively furthering" provision must be applied to the LIHTC, which has replaced public housing as the nation's most significant affordable housing development program. More specifically, these amici contend that the HMFA has violated the federal Fair Housing Act by not taking into account issues of racial and ethnic segregation and must do so.

These amici also provide an initial explanation of some of the ways that HMFA might take such steps. First and foremost, amici emphasize that a necessary starting point for compliance with the affirmatively furthering obligation is what the courts have termed an "institutionalized method" for obtaining and considering racial and other demographic information. To date, HMFA has not done so. More broadly, while amici note that the LIHTC is a different program than public housing, they emphasize that the QAP offers ample opportunity to further fair housing goals, such as through a pro-integration funding cycle or through the assignment of additional points to projects that demonstrate an intent and ability to achieve integrated housing. In raising these preliminary suggestions, the nonprofit amici note that HMFA has substantial discretion regarding how to distribute the annual LIHTC allocation. Part of HMFAs discretion, however, must involve how best to affirmatively further fair housing.

The second legal issue concerns the application of the Mount Laurel doctrine.[26] In brief, these groups assert that the Mount Laurel doctrine applies as fully to the state and its agencies as it does to municipalities whose zoning authority emanates solely from the state itself.

More specifically, they contend that HMFA has failed to take significant steps toward meeting its "awesome constitutional obligation" to provide real opportunities for low income housing opportunities throughout the state. Until 2003, HMFA had limited the availability of funds to suburban projects and provided only small weight to such development that would also explicitly further the Mount Laurel doctrine. This limitation, the nonprofit

amici note, is a special concern given the New Jersey Supreme Court's firm expectation that one of the ways municipalities would be expected to meet their affordable housing obligations was by "procuring available Federal or State subsidies to aid in the construction of affordable housing." Thus, far from representing a distortion of HMFA's mission to use the LIHTC to further the goals of the Mount Laurel doctrine, these amici suggest that it is in keeping with it.

Policy Issues

Although the nonprofit amici in their joint briefs note that a full-scale discussion of the specifics of a revised QAP is premature, they do outline principles for a QAP that, in their view, would be legally compliant and further sound policy objectives. These are: that racial integration should be one major criterion taken into account in the allocation process; that the provision of family LIHTC housing in appropriate suburban locations should be a priority and that "appropriate suburban locations" means housing at locations that offer a meaningful opportunity for racial integration, and seek to serve the broadest possible range of economic groups (in other words, that do not seek to serve only the highest of the income eligible population); that provision of housing in urban areas that furthers racial and economic integration and/or helps implement a meaningful neighborhood revitalization strategy should also be a priority; that the allocation process should not disproportionately favor suburban over urban sites; and that flexibility should be preserved to permit other projects addressing critical housing needs to be accommodated.

In setting out these principles, the amici emphasize several points. First is the importance of information collection and assessment as an initial step toward establishing site selection standards. In reinforcing this point, the nonprofit amici note that "the institutionalized method" for information assessment should not necessarily preordain the outcome of the allocation process, but that no meaningful process can take place without the data.

Second, in considering what the ultimate site selection criteria should be, the nonprofit amici note that geographic location is only one factor that determines whether housing can or does further integration. Urban affordable housing can promote integration if appropriately undertaken, and suburban affordable housing development all too frequently does not. Instead of an exclusive focus on geographic location, the nonprofit amici suggest that other factors that should be taken into account, such as whether an urban project is undertaken as part of a meaningful neighborhood revitalization strategy and whether suburban locations are accessible to mass transit, meaningful employment opportunities, and critical supports (for example, affordable child care).

Finally, these amici emphasize that the problems inherent in both the ongoing efforts to rebuild New Jersey's urban areas and the continued dramatic levels of residential segregation in the state cannot be solved in the context of a single housing program, even one as significant as the LIHTC. Ultimately, these challenges require a multi-faceted approach based on significant public and private sector leadership, political will, a coordinated approach across a range of programs, and the commitment of resources. Nonetheless, the issue raised by the litigation is whether the state's allocation of its LIHTC resources will help address, rather than ignore or even exacerbate, the broader challenges.

Emerging Issues and Questions

The result of the civil rights challenge to the New Jersey LIHTC allocation is unknown as of this writing and almost certainly will not be finalized for years to come. (It appears that whichever party loses in the appellate division will appeal to the New Jersey Supreme Court.) Nonetheless, the litigation to date and the dynamics it has spawned raise several initial questions and concerns applicable not only to the particular question about how the civil rights laws should be applied to the LIHTC, but more broadly to efforts that implicitly or explicitly seek to address residential racial segregation. Some preliminary thoughts in this regard follow.

• MOVING BEYOND URBAN VERSUS SUBURBAN

In the litigation, the debate about the appropriate way to allocate the LIHTC is frequently discussed in terms of

whether HMFA has allocated too many of the LIHTC resources to urban areas. This seems problematic.

First, the framing of the debate as urban versus suburban leads to the exceedingly troublesome inference that one believes that urban areas are "bad" and suburban areas are "good." One does not need to revisit the long-standing debates about place-based revitalization versus person-based development strategies to see how such a simplistic framing has ill-considered political and policy implications.

Instead, it is worth focusing upon how this effort, and others like it, can be reframed, as John Powell has started to do,[28] in terms of "opportunity" and the need to address the underlying reasons why reinforcement of racial segregation limits them. This creates the context in which to explain how government action created and reinforced residential racial segregation and thus why public action is warranted to overcome it. Moreover, it allows the broadening of the discussion to incorporate not just housing location but employment and transit access and other aspects of meaningful economic opportunity.

• MAKING THE CASE: EXPANDING THE CHOICE PARADIGM

In the litigation and the public debate it has started to generate, it is not certain that there is widespread consensus on the importance and value of integration. This must be addressed.

As a preliminary matter, it appears to be necessary to explore and explain further what is meant by integration in this context and in today's society. This seems particularly necessary given how multiethnic and multiracial this country has become, the substantial presence of new immigrants particularly in urban areas, and new conceptions of the role diversity plays or should play. This certainly can be done, as suggested by the Supreme Court's recent affirmative action decision in *Grutter v. Bollinger* recognizing diversity as a compelling governmental interest in higher education.

Further, it appears necessary to explain more fully the basis for social policy in this area. Part of the challenge is how easily this effort can be (mis)interpreted as paternalistic and an attempt at crude and ill-considered social engineering. While there is no need to be defensive in articulating why integration matters, the response must be articulated in such a way as to not further such impressions. In part, this can be done, it seems, by emphasizing what it means to provide individuals seeking economic and other opportunity with a meaningful choice—not just a theoretical one. Beyond this, it seems necessary to connect such efforts to a broader discussion about the value of integration not just for specific individuals and communities but our society as a whole.

• THE ROLE OF LITIGATION AND BROADER STAKEHOLDER ENGAGEMENT

Finally, it seems necessary to define and connect the role this and other litigation efforts can play within broader racial and economic justice strategies.

As a starting point, it is unlikely that even a fundamental reallocation of LIHTC resources by themselves would lead to a substantially more integrated state. Further, the courts, even in a state with a progressive and activist judicial tradition such as New Jersey's, are unlikely to take a leadership role on such issues without simultaneous efforts to build a broad base of public support and even political consensus. In this regard, it is important to remember that the establishment of an appropriate legal standard is only a first step and that the critical issues of implementation and continued monitoring require sustained engagement over multiple years.

If this is accurate, it is necessary to consider whether and how to use this litigation as a beachhead to engage a broader range of stakeholders in pursuit of the longer term goal of integrated communities. This focuses attention not only on the case's potential for significant program reform but also on the manner in which it raises the profile of the issue and the extent to which it can and is used to build a political constituency for the end goal. More practically, this suggests the importance of determining how best to engage the private-sector developers and syndicators, as well as the public agencies and nonprofit HOPE VI actors, who are central players

in the LIHTC program. For example, any serious effort would require that HMFA demonstrate a long term commitment to integrated housing, such as by facilitating the identification and acquisition of sites and properties best suited for integrated housing development.

CONCLUSION

There is no easy answer to the Kerner Commission's challenge, as the experience of the past thirty-five years has demonstrated. Nonetheless, the application of civil rights law to the LIHTC offers a critically important opportunity to do so. Both the promise and the unanswered questions this litigation poses demonstrate that much work remains to be done—not just by judges and lawyers but by all those committed to a just and equitable society.

NOTES

1. Kerner Commission fn 157 at AA p. 59.

2. General Accounting Office, *Federal Housing Assistance: Comparing the Characteristics and Costs of Housing Programs*, GAO-02-76 (table 2). Washington, D.C.: General Accounting Office, January 2002). It is particularly significant since the LIHTC is the "only major Federal assistance program that is currently active" for funding new or rehabilitated subsidized housing. 24 C.F.R. § 81.

3. In the litigation, I serve as co-counsel with Larry Lustberg and Phil Gallagher of Gibbons, Del Deo.

4. See, for example, Gary Orfield et al., *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: New Press, 1996); David Rusk, *Inside Game, Outside Game: Winning Strategies for Saving Urban America* (Washington, DC: Brookings Institution, 1999).

5. These include the Local Initiatives Support Corporation (LISC), which filed a brief regarding the benefits of urban development efforts; the Lawyers Committee for Civil Rights, addressing the basis for the civil rights claim; and Professors Rise Peterson and Myron Orfield, who attempt to place the issue within a regional equity framework and discuss how the program can be realigned to maximize "opportunity-rich" development.

6. The four organizations are the New Jersey Institute for Social Justice (NJISJ), the Coalition for Affordable Housing and the Environment (CAHE), the Housing and Community Development Network (HCDN), and the New Jersey Public Policy Research Institute (NJPPRI).

See, for example, "Rice Leads Protest on Housing Delays," *Newark (NJ) Star-Ledger*, May 20, 2003, noting that State Senator Ron Rice charged court appeal delays critically needed urban housing. The developers of these projects were awarded tax credits LIHTC allocations as defendants threatened the allocations because no private investor would be willing to participate in a transaction with such litigation risks. Among the projects so threatened were five HOPE VI projects, including those in Newark, Elizabeth, Jersey City, and New Brunswick. State and local officials viewed these efforts, like many HOPE VI projects, as among the most significant efforts to create affordable housing efforts in these localities. In Newark, because the Newark project was part of a federal consent decree, the Newark Housing Authority filed a motion with the federal court contesting the validity of its being included in the companion lawsuit. Ultimately, the NHA and the Fair Share plaintiffs reached a settlement which the Fair Share plaintiffs released the NHA in exchange for an expanded housing voucher program for NHA Section 8 recipients.

8. The Index of Dissimilarity (D) measures the extent to which two different groups are spread among the census tracts of a particular city. According to the Lewis Mumford Center for Comparative Urban and Regional Research at the University of Albany, "The index ranges from 0 to 100, giving the percentage of one group who would have to move to achieve an even residential pattern—one where every tract replicates the group composition of the city. A value of 60 or above is considered very high. For example, a D score of 60 in a city where segregation means that 60 percent of either group must move to a different tract for the two groups to become equally distributed. Values of 40 to 50 are usually considered moderate levels of segregation, while values of 30 or less are considered low." *Ethnic Diversity Grows*, 2.

9. *Ethnic Diversity Grows, Neighborhood Integration Lags Behind*, Lewis Mumford Center, April 2001, <http://mumford.albany.edu/census/2000/WholePop/WholePopReport/MetroFindings.pdf>. The Philadelphia metropolitan area, which includes parts of New Jersey, is twelfth, with an index of 72. While Philadelphia's index of dissimilarity has improved from 78 in 1980 to 72 in 2000, it also remains an intensely segregated area. *Ethnic Diversity Grows*, 7.

10. New Jersey Public Policy Research Institute, *State of Black New Jersey: Issues for a New Millennium 2002-2003* (New Jersey Public Policy Research Institute, 2004), 5-6.

11. This article uses the term "lower-income housing" to refer to housing restricted to persons with incomes at or below 80 percent of median, and to avoid confusion over differences between federal and state definitions. Federal housing programs generally use the term "low-income housing" to refer to housing available to persons below 80 percent of median, and "very low income" to persons below 50 percent. New Jersey uses the term

"low income" to refer only to those persons at or below 50 percent and "moderate" for those between 50 percent and 80 percent of median. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 *N.J.* 158, 221 n. 8 (1983).

12. HMFA, *Federal Low Income Tax Credit Program* http://www.state.nj.us/dca/hmfa/txcredit/lihtcpgmsmry.html.

13. Unlike most federal housing programs, which are operated by the United States Department of Housing and Urban Development (HUD), the LIHTC is the responsibility of the Treasury Department, through the Internal Revenue Service (IRS), since the program utilizes the tax code to leverage resources for lower-income housing by allowing developers of residential rental property to claim tax credits, normally for ten years, for a significant percentage of the value of new or substantially rehabilitated housing units available to lower-income persons. For a brief description of how the LIHTC functions, see Florence Roisman, "Mandates Unsatisfied: The Low Income Housing Tax Credit Program & the Civil Rights Laws," 52 *U. Miami L. Rev.* 1011, 1014 (1998).

14. Prior to 1996, HMFA did not competitively allocated the tax credits.

15. For several years, HMFA included a set-aside for HOPE VI projects. In the course of the development of the 2003 QAP, HMFA undertook a more concentrated effort to identify the policy goals for its allocation, specifying eighteen goals that fell within three thematic headings: affordable housing, smart growth and community revitalization. Among those that fell within the community revitalization heading were deconcentration of poverty and promoting mixed income development. See 35 N.J.R. 3521.

16. For a more detailed discussion, see pages 7–9 and 26–30 of the brief, which is available at www.njisj.org (in regional equity section).

17. See N.J. Admin. Code tit. 5, § 80:33.13(c)(14). In the QAP, HMFA does not require data collection on the racial characteristics of the project or area, or determination of whether the marketing is successful in meaningfully promotes the ultimate integration of the project is required. By itself, affirmative marketing stands little chance of furthering racial integration.

18. 42 U.S.C. s. 3608 (d).

19. *Shannon*, at 818. Read together the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. Whatever the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.

20. Ending such discrimination against individuals is no easy task, as the past thirty-five years have demonstrated.

21. AA at 57. Quoted in Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993), xi.

22. *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970).

23. Id. at 820–821.

24. See, for example, 24 *C.F.R.* §§ 891.125 (c), 941.202(c), 983.6(b)(3). These essentially tracked a second important point in Judge Gibbons's opinion: that overcoming racial segregation, while critically important, was not and could not be the sole goal of federal housing policy. The court stated, "Nor are we suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one, one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration." Id. at 823.

25. To some extent, this is because the Internal Revenue Service, not HUD, is responsible for the LIHTC. While HUD has an extensive history in attempting to balance various social policy goals in the context of housing programs, the IRS does not. In a limited way, the federal agencies took the first step to address this disconnect through a Memorandum of Understanding (MOU) signed in August 2000 in which the three secretaries agreed "to promote enhanced compliance with the Fair Housing Act." See www.usdoj.gov/crt/housing/mou.htm. This MOU focused primarily on basic nondiscrimination provisions rather than the issues involved here.

26. In 2003 HMFA provided a single cycle for all projects seeking to provide family housing, thereby discarding its prior practice which delineated suburban locations for urban and suburban projects. Although this appears to open greater opportunities for housing that furthers [illegible] the absence of any suburban projects in the 2003 locations indicates the potential gap between theory and practice.

27. For a fuller discussion of the principles that should underly the LIHTC, see "Toward a Policy Framework for the Allocation of Low Income Housing Tax Credits" by Alan Mallach (April 21, 2003), available at the New Jersey Institute for Social Justice Web site, www.njisj.org (in regional equity section).

28. See, for example, powell, "Opportunity-Based Housing," 12 *J. of Affordable Housing and Community Development* 188 (2003).

SEGREGATION AND INTEGRATION IN NEW JERSEY

Laura Morris Siena

Introduction: Segregation and Wealth

African Americans in New Jersey are doing better than ever before as documented by the 1990 U.S. Census and reported in *The State of Black New Jersey: Issues for a New Millennium 2002-2003*. For instance, the number of African American households with incomes in excess of $100,000 increased by more than 40 percent over the decade and the homeownership rate among African Americans increased by nearly 3 percent—the same percentage as that of white New Jersey [illegible]

However, even those two bright statistics [illegible] African American [illegible] $100,000 or more in income represent less than [illegible] percent of all households with similar incomes, although African Americans make up 13 percent of the state's population. And, while homeownership grew at the same rate for African Americans and whites, it grew from a very different base. In 2000, more than 70 percent of white New Jersey households owned their own home, as compared to just over 37 percent African Americans.

Income is only one way to measure a family's or individual's financial stability. Wealth creation is a better indicator of a family's overall financial health and its ability to weather short term financial stresses like a lost job or a catastrophic illness. A family with wealth is not completely dependent upon income for its survival, but rather has investments or real estate to fall back on when necessary.

For the majority of Americans who are homeowners, the equity in that home is their principal source of wealth and the largest asset they will pass on to their children. The value of a home depends in large part on whether that home and the neighborhood in which it is located are in demand in the housing market. It makes sense that homes located in communities where there is a robust demand from a wide range of potential buyers will sustain and increase their value over time. However, most African Americans live in segregated, predominantly minority communities where only African Americans compete in the housing market, and they pay a "segregation tax" to live there. As David Rusk noted, a typical four-bedroom house with one bathroom will be worth a full 18 percent less in an all-black neighborhood than it would in a predominantly white neighborhood. Thus, even African Americans' slice of the American dream—homeownership and an asset to pass on to children—is worth less than that of white Americans.

How much does this matter? Eighteen percent is a significant proportion, but after all it is not one-half or three-quarters. However, factoring one more ingredient into the picture, *time*, makes it clear why the segregation tax has a profound impact on African Americans' overall economic progress.

Over generations, if the asset that is passed on is worth less, asset accumulation is less. The last decade has seen groundbreaking research on wealth differences between whites and people of color in the United States, most notably by Melvin Oliver, Thomas Shapiro, and Dalton Conley. While this new field of research is rich with compelling data, just a few examples will serve to [illegible] the point here. For instance, nonwhite families' asset base is on average only one-seventh of white families.[3] The average African American family has no net financial assets whatsoever—current debt is larger than assets.[4] Professor john powell has noted that while white baby boomers are inheriting an aggregate of 14 trillion dollars as their parents die, African American baby boomers are inheriting a net debt.[5]

> ***. . . most African Americans live in segregated, predominantly minority communities where only African Americans compete in the housing market, and they pay a "segregation tax" to live there.***

An analysis of wealth accumulation is only one relevant factor in understanding various groups' access to opportunity. However, it serves as an important guidepost to any understanding of racial inequality. And the cause for unequal wealth accumulation through home equity is racial segregation.

More broadly, racial segregation continues to be the major factor inhibiting the full participation of African

Americans in the economic, political and social opportunity structures of the United States. Where you live determines to an overwhelming degree what kind of elementary and high school education you receive, the level at which that education is funded, your prospects for attending college and graduate or professional school your access to the job market, the value of your home, the ability of your neighborhood to provide shopping, entertainment and recreational opportunities close to home, and the safety of your person and your property And, ultimately, where you live determines in large part the amount of wealth you can accumulate Eliminating or even substantially reducing racial segregation would go a long way toward enabling African Americans to fully enjoy the best of what America has to offer [6]

New Jersey's Segregation Picture

Hypersegregation continues to define the way New Jersey residents live.[7] Segregation is measured by social scientists using the "dissimilarity index," which measures who is living in each census tract against the overall proportion of African American, Latino, Asian, and white people living in a region Then, pairs of races or race/ethnicities are created to measure how much segregation exists between each group. The dissimilarity index is a scale of 0–100, with any rate over 60 considered to be very segregated White segregation rates decreased somewhat in the last decade of the twentieth century, New Jersey's most densely populated regions still suffer from very high rates of segregation For instance, in the Newark PSMA (Primary Statistical Metropolitan Area), which includes the city of Newark as well as Essex, Morris, Sussex, Union and Warren counties, the dissimilarity index for whites and blacks is 80 percent That means that more than 80 percent of all black and white households would have to move to another community in order to eliminate black/white segregation. This represents a very modest decline of just over 2 percent from 1990 and is one of the highest segregation rates in the United States.[8]

The "tale of two counties" --a comparison of Morris and Essex counties—gives the picture more detail While both counties are in the Newark metro area, Essex County is "majority minority," with just 37 6 percent white population By contrast, Morris County is 82 percent white More than 15 percent of Essex County's households are below the poverty line, whereas just 3.9 percent of Morris County's households live in poverty In fact, Morris County's median household income is 75 percent higher than that of Essex County.[9]

Sprawl—Today's Civil Rights Challenge

What gives racial segregation continued life and, in fact, new energy, is the seemingly endless march of suburban sprawl, which is using up what's left of New Jersey's farmland and depopulating the built infrastructure of cities and inner-ring suburbs. [0] New Jerseyans continue to use up land at more than double the rate of their population growth As New Jersey Future has pointed out, the population of the state increased 6 percent from 1986 through 1995 while the percentage of developed acres increased by 14 percent This trend has likely accelerated since the mid-1990s as "McMansions" continue to spring up like new corn

The vast majority of the people moving to these new exurbs are white and middle class. Whites are "voting with their feet," spreading out farther and farther, leaving behind perceived "urban problems." As a result, there is a reduction in the middle-class population, tax capacity, and economic activity in parts of the state with existing housing and commercial areas, a transportation infrastructure, and a wealth of cultural institutions. Moreover, businesses are relocating to exurbs. New corporate parks are built at the intersections of major highways, which creates a barrier to access for people who require public transportation

Many inner-ring suburbs now experience the stresses formerly reserved for large cities: declining tax base, disinvested infrastructures, and stressed schools. There is a direct relationship between the suburbs that are experiencing the greatest level of stress and those that are experiencing the most rapid racial transition [11] As well documented by John Powell, Myron Orfield, and David Rusk, increasingly minority suburbs pay a high price in

terms of loss of access to investment capital, economic development, and a rise in poverty.

And, where most people of color live is not where the opportunities are plentiful. john a. powell's research on how regions work to provide or inhibit access to opportunity for various groups provides a compelling analysis of the spatial dimension of racism. As he notes:

> A substantial entry-level labor *pool* exists in the central city and certain inner-ring suburbs of many regions. Entry-level *jobs* are scarce in these municipalities, however. More than 14 million jobs were created in the nation between 1993 and 1998, but only 13 percent of those jobs were in the central city. Looking at entry-level jobs for 1999, researchers found that predominantly White suburbs host nearly 70 percent of these jobs while central cities host merely 10 percent. The spatial arrangement, or mismatch, of the labor pool and jobs contributes to employment disparities by race.[14]

Federal highway programs and taxpayer supported infrastructure [illegible] create strong incentives for sprawl development. Removing these incentives and placing them where they will create more equitable access to opportunity structures is essential to an equitable distribution of opportunity in the United States.[4] Enabling people of color to move to places of economic opportunity is also an essential component of creating access to equity for those who have been left out of the American dream. So, too, is rebuilding central cities as mixed-race, mixed-income communities of choice. Thus, the continued sprawling of New Jersey and the rest of America is rightly a focus for civil rights organizing.

How Racial Segregation Came to Be

Racial segregation in America is not a natural phenomenon, rather, it is the creation of the federal policy and private actions such as landlords and real estate agents seeking to protect their perceived interest through racial segregation. As Douglas Massey and Nancy Denton note in their groundbreaking work, the modern low-income, minority urban neighborhood and the modern white suburb share a history—the development of each is inextricably linked to the creation of the other.[15]

First, as Jim Crow de jure segregation was eliminated, whites found a host of other ways to keep African Americans within localized boundaries of urban areas, including threats of violence and violent acts. Then, through the Home Mortgage Finance Act (HMFA) and federal highway programs, the federal government created the modern suburbs for whites only, while at the same time systematically denying access to capital to increasingly minority central cities.[16]

The turn of the twentieth century saw relatively low levels of racial segregation, as America's mostly agrarian economy utilized the skills and work of people of many races and ethnicities. The social status of some whites—Irish immigrants, for instance—was in some cases lower than African Americans. However, as the black population grew, particularly in the industrial areas of the East Coast and Midwest, whites took action. From violent attacks designed to intimidate blacks from moving out of burgeoning ghettoes to restrictive covenants on entire communities of homes, promoted by boards of realtors, whites denied African Americans access to a wide range of housing opportunities.

Then, from the 1930s on, the modern urban low-income minority neighborhood was institutionalized in a "perfect storm" of factors created and sustained by the federal government. First came the Home Owners Loan Corporation (HOLC), which was created to provide funds to refinance mortgages in danger of default. The HOLC acted to stabilize the mortgage markets by pioneering on a mass scale the use of long-term, self amortizing mortgages with uniform payments.[18] Its other claim to fame, however, is that it initiated the practice of redlining. Any area with black residents was circled in red on the map and no new mortgages were written within that area. Banks picked up the HOLC system and used it to make decisions about their own lending practices. This system also influenced the underwriting practices of the Federal Housing Authority (FHA) and the Veterans Administration (VA) during the 40s and the 50s.[19] Thus, areas with black residents were denied capital for homeownership, renovation, and economic development.[20]

The FHA and VA, which guaranteed mortgage loans for a vast number of white returning war veterans, were also responsible for creation of new suburbs. Federal highway programs—at first justified to taxpayers as a necessary network of transportation alternatives in support of national security—spent huge sums to create the roads necessary to transport people from increasingly remote suburbs to jobs in the central cities. These new suburbs were filled with white families, for whom purchasing a brand-new home was less expensive than renting in their older, central city neighborhoods. Since African Americans did not have access to these new neighborhoods, they were shut out of these new communities with new schools, better services, and the opportunity to create wealth through higher housing values.

While restrictive covenants were declared unenforceable by the Supreme Court in 1948, and redlining has been declared illegal, the legacy of these and other programs continues today. Federal low-income housing programs continue to be sited in already segregated central cities instead of in suburbs where opportunity lies.[1] In New Jersey, the Mount Laurel decisions could have led to a new era of equitable distribution of housing opportunity, but opposition has led to continued controversy and the perversion of the decisions' original purposes.[2]

Furthermore, outright discrimination in the housing markets continues to thrive. The large-scale HUD-sponsored *Discrimination in Metropolitan Housing Markets: National Results from Phase I of HDS2000* found that black renters experienced discrimination 17 percent of the time, while blacks seeking rental housing experienced discrimination more than 21 percent of the time.[3] Although both of these indicators were down significantly since the last time the study was conducted in 1989, the rate of discrimination is still much too high.

Fair Housing Enforcement: A Weak Instrument

Today it is difficult to re-create the sense of excitement, hope, and opportunity that accompanied the passage of the major civil rights legislations in the United States. In 2004 we look back on those victories as essential steps in a very long journey, rather than as the destination or even the final pit stops on the way to equal rights for people of color. Many fair housing proponents in the 1960s really believed that the passage of the Fair Housing Act in 1968 would mean the end of discrimination and segregation in our nation. It does not take away from their achievements to understand that this was not possible given the depth of bigotry and resistance in our society.

It is essential to understand that the Fair Housing Act was constructed in such a way that it could not achieve the lofty goals of civil rights leaders. Mara Sidney's recent book *Unfair Housing*, includes a masterful overview of how the legislative history of the Fair Housing Act's passage defined its policy implications and how it was structured to have limited utility in eliminating housing discrimination. It is possible to include only a small piece of the book's analysis here.

In defining discrimination as an act against an individual and by making the individual responsible both for understanding that he or she had been discriminated against and for bringing a complaint to the appropriate agency, the Fair Housing Act ensured two outcomes. First, it ensured that the number of complaints would be small relative to the overall incidence of discrimination because of the effort an individual would have to undertake to lodge a discrimination complaint. Second, enforcement would not be empowered to address the structures that create and sustain unequal access to the housing markets. In fact, the Fair Housing Act created only the weakest enforcement mechanisms and needed to be amended to strengthen them. As evidenced by the recent HUD discrimination study, discrimination in the housing market continues to thrive.

In addition to weak enforcement of fair housing violations in the private housing markets, the federal government, through its public housing programs, continues to be one of the most prodigious promoters of segregation. Philip D. Tegeler, in an excerpt in neighborhood dynamics, makes the point:

> HUD's "site and neighborhood standards," developed initially in response to the 1970 case of *Shannon v.*

D, were an important part of the implementation of the 1968 Fair Housing Act. The *Shannon* case successfully challenged HUD [illegible] amelioration of racially segregative effects of new housing projects, finding that the agency had failed in its duty, under the Fair Housing Act, to affirmatively further fair housing." These site and neighborhood standards [illegible] called) was as important as creating new housing opportunities for minority families in less segregated [illegible] neighborhoods.

The HUD site and neighborhood standards are still formally on the books, but they no longer apply to programs that create significant amounts of housing. [illegible] low-income housing development programs are largely unregulated from a civil rights perspective. Rules designed to prevent segregation in the old public housing and Section 8 construction programs have been overlooked in the federal Low Income Housing Tax Credit Program and severely modified in the HOPE VI public housing redevelopment program. Other current programs that provide funds for [illegible] are similarly lacking in anti-segregation [illegible] For example, the Community Reinvestment Act has no siting controls, and actually gives credit to banks for financing segregated low income rental housing in high poverty neighborhoods. The federal HOME program disburses funds to cities and states primarily for housing rehabilitation, but imposes few meaningful restrictions on where rehabilitated low income housing units should be placed."[35]

Finally, there has been no political will to engage the second goal of the Fair Housing Act: the creation of "balanced living patterns" or racial integration. It is evident that elimination of discrimination in the housing markets will not eliminate segregation, much less create integration. A new way of thinking about our shared future will be required to achieve that goal.

Who Wants to Live Where?

African Americans have historically been open to living in mixed-race communities, as detailed in a series of surveys undertaken by Lawrence Bobo, Howard Schuman, Camille Zubrinsky Charles, and others over many years. The vast majority of African Americans—85 percent—want to live in neighborhoods with some degree of integration.[36] Fewer than 10 percent have expressed a reluctance to live in a community that is 50 percent white. When asked to explain their preference, two-thirds of blacks stressed the importance of racial harmony.[37] The majority of whites, too, have expressed a theoretical willingness to live with people of color.[38] 75 percent said they would favor or strongly favor living in an integrated area, and nearly 50 percent expressed a neutral opinion.[39] As long ago as 1985, 74 percent of the white population claimed to disagree with the statement that "white people have a right to keep blacks out of their neighborhoods, and blacks should respect that right."[40] Attitudes of whites have improved somewhat in the intervening years.

However, whites, Asians, and Latinos all put African Americans at the bottom of a hierarchy of potential neighbors. Asians, Latinos, and African Americans put whites at the top of the same hierarchy.[41] In addition, there is a marked difference between members of racial and ethnic groups' responses on surveys and their actual behavior: even whites professing to be supportive of interracial neighborhoods tend to purchase homes in all-white or mostly white neighborhoods.[42] As Lawrence Bobo writes, "The historical and present dominant social group is white Americans. The historical (and at least perceptually, if not also in fact) present bottom group is African Americans. For blacks, Latinos, and Asians, economic and social advancement is associated with greater proximity and similarity to white Americans. For whites, [illegible]egration—especially with blacks—brings the threat of a loss of relative status advantages. As a result, attitudes on an issue like racial residential integration are likely to have very different meanings to whites than to members of any other ethnic group."

It is understandable that African Americans might not wish to "pioneer" in a new neighborhood, being the first or among the first people of color to move in. This is particularly true since it is not always evident which neighborhoods are likely to be welcoming to people of color. Many African Americans are willing to take that step, however. Included in their calculus is an understand

ing that they will be purchasing better services and better schools for their tax dollars, and housing appreciation to build wealth

Where Integration Thrives Today

It is clear that changing the dynamics of racial segregation is a long term process. In the meantime, we can look to examples of communities that have undertaken intentional efforts to create and sustain racial integration These communities not only serve as worthy examples for emulation, but also model a new American reality to which we can point

Efforts to create and sustain stable integration got their start as early as the 1950s when middle-class African Americans began moving into Mt. Airy, a section of Philadelphia characterized by handsome and varied housing stock, well-established trees and landscapes, and other amenities that continue to make it an attractive [illegible] choice In 1953, the [illegible] congregations [illegible] Jewish, one Methodist, and one Unitarian-Universalist, signed a covenant pledging to welcome their new neighbors, and—importantly—not to move This early faith-based coalition spread out to include a community-wide effort whose goals were to prevent block busting and white flight, to build interracial relationships and trust, and to promote the community as one of choice for white homebuyers as well as people of color Many of the techniques that are still used in intentional integration efforts were developed in Mt. Airy As a result, the western portion of Mt. Airy enjoys a singular distinction among American neighborhoods: it is the only community whose racial mix has hovered at about 50 percent white/50 percent black over four census periods, with fairly good distribution of whites and people of color throughout all of the census tracts.

The banner of intentional integration was taken up by other communities in the 1960s and 1970s, most notably in Chicago suburbs such as Oak Park and Cleveland suburbs such as Shaker Heights and Cleveland Heights. These communities elaborated upon and extended the techniques originally developed in Mt. Airy

The number of stable diverse communities continues to grow. A HUD-sponsored study by Philip Nyden and others, published in 1998, estimated that more than ten million Americans live in diverse neighborhoods within cities.[14] Ingrid Gould Ellen has noted that in the 1990 census there were fewer census tracts with no people of color and that trend has accelerated since then.[15] This is due in part to the increase in the immigrant population and the movement toward the suburbs by both immigrants and people of color

However, white flight still exists, although not to the extent America experienced in the past, and white avoidance of neighborhoods considered to be undergoing racial transition is still a powerful force for resegregation For communities that lie in the trajectory of racial change, only a considerable effort can result in a different outcome

Today, there is resurgence of interest in creating new integrated communities. The story of a recent example the two towns of South Orange and Maplewood, New Jersey, which share a single school district, provides a helpful case history for others to follow

Fund for an OPEN Society (OPEN) is the nation's only organization whose mission is to promote racially and ethnically integrated communities. OPEN assists communities that want to become stable and inclusive by providing advice about techniques that can be used to create successful integrated communities, by documenting and sharing those techniques, and by working to create a network of communities committed to integration

South Orange and Maplewood are two middle-class Newark suburbs. Like Mt. Airy, they enjoy attractive and varied housing stock and handsome and accessible parks. They also feature easy access to New York by both public transportation and highways, well-regarded public schools, and well-maintained, vibrant commercial districts with a variety of restaurants and retail establishments

In the mid-1990s, a small of community leaders noticed that property values in South Orange and Maplewood

were failing to rise as fast as those in neighboring towns. The growing number of people of color in the housing market led these leaders to speculate that white people might be avoiding purchasing homes in South Orange and Maplewood, fearing that the communities would become completely segregated. With the assistance of Fund for an OPEN Society staff, community leaders have undertaken a comprehensive, multipronged intentional integration initiative whose overarching goals are to

- Balance the demand for housing among whites and people of color; and
- Balance the participation of people of color and whites in the power structure and civic life of the community.

These two goals can be achieved because leaders and residents alike have learned to talk openly about race and its effects on housing markets and public life, and have embraced a race-conscious approach to community-building.

Creating a Structure

First, community leaders formed a new, not for profit organization, the South Orange-Maplewood Community Coalition on Race, to implement the intentional integration program. This organization has been funded jointly by the two municipal governments and by foundation grants and individual contributions. The Community Coalition has several active committees, including Schools; Marketing; Code Enforcement and Ordnance; Monitoring, Evaluation, Research and Training; and Interfaith Outreach. With a small paid staff, the Community Coalition relies on the efforts of more than two hundred volunteers to carry out its program.

Balancing Housing Demand

The Community Coalition has used a variety of tools to increase demand among people who were underrepresented in the housing market, which in this case were whites. A series of advertisements were run in local papers in the Upper West Side of Manhattan, Brooklyn Heights and Park Slope in Brooklyn, Hoboken, and Jersey City, positioning South Orange and Maplewood as attractive communities for first-time homebuyers seeking a suburban lifestyle and strong public schools but wishing to live in a cosmopolitan neighborhood. The advertisements included a toll-free phone number for the Community Coalition. Potential home seekers calling that number were mailed a marketing packet on the two towns, and were offered a tour of the communities conducted by a volunteer resident in his or her automobile. These tours are offered to subvert potential steering by real estate agents and to offer potential homebuyers an opportunity to see every part of the community and a full range of housing choices.

The Community Coalition has also successfully created a positive image through sustained coverage in the regional and national media. A succession of positive articles on various aspects of community life—some specifically about the intentional integration initiative but most about more general community assets—have created a drumbeat of positive coverage that has created and reinforced the image of South Orange and Maplewood as communities of choice. A lengthy, in-depth article in the *New York Times* in April 2003 led to such a response that community tours by potential residents, which were previously conducted by car, now have to be conducted by jitney.

With realtors, the Community Coalition has used a carrot-and-stick method designed to prevent them from steering potential homebuyers away from the two towns. The Coalition has reached out to all local real estate agents, ensuring that they are aware of all the positive aspects of the communities. At the same time, the Coalition founded a new fair housing organization, the Morris, Union, Sussex, and Essex Fair Housing Council (MUSE) to conduct paired-tester tests to detect whether discrimination and steering exist in the housing market.

A second mortgage program is used to balance homebuying within the community. Whites and people of color choosing to purchase homes in parts of the community where their race is underrepresented are eligible for a second mortgage of $10,000 at a significantly reduced interest rate.

Finally, South Orange and Maplewood have moved assertively to ensure that their housing stock is maintained by undergoing a review of codes and ordinances and by enforcing those codes. Since most of the housing stock is at least 50 years old, this is particularly important.

Creating Balance in Community Life

Understanding that race consciousness is a necessary cornerstone in the intentional integration process, the Community Coalition conducts its own affairs in a way that accounts for the role of race in individual and group actions. For instance, the Coalition's bylaws specify that for quorum to be achieved, people of more than one race have to be present.

In the broader community, the Community Coalition's goal has been to create an "integration culture" by encouraging residents' comfort level with talking openly about race, by building interracial trust and relationships, and by working to address potential problems. The Coalition has sponsored a wide variety of events, including all-community book readings, study circles, and specially commissioned plays to put the issue of race at the center of community-building exercises and to give residents forums to address their concerns. Specific initiatives have included the work of the Schools Committee, which works to build community/school relationships and to address concerns over the testing achievement gap and the relative scarcity of children of color in Advanced Placement classes and higher level academic tracks. Another essential component has been outreach to the faith community, bringing clergy and laypeople into the Community Coalition and using congregations as a distribution mechanism for information about what the Coalition is working to achieve. In addition, the Coalition has worked to foster and sustain small community and block associations throughout the community. Representation by people of color has increased on both town councils, leading to a better balance in the power structure of the community.

The Results Are In

Since 1996, when the Community Coalition began its work, it has achieved remarkable success toward its overall goal of creating and sustaining intentional integration. Specifically:

- Housing values are now increasing at a proportionately higher rate than those of white- and black-segregated surrounding suburbs.
- HMDA (Home Mortgage Disclosure Act) data shows that whites and people of color are now buying in every census tract in the community.
- Maplewood was named by Money magazine (December 2002) as one of the top ten communities in the nation; the article specifically cited Maplewood's diversity.

Less simple to quantify, but equally important, is the new image of South Orange and Maplewood as cosmopolitan communities of choice for people seeking a suburban home with the atmosphere, diversity, and amenities traditionally associated with more urban neighborhoods. This kind of image creation over time becomes a self-fulfilling prophecy, as potential homebuyers and renters are drawn to a community that they know will be racially integrated. For blacks, purchasing a home in South Orange or Maplewood makes sense because it is likely that housing values will be sustained over time, building wealth through increased equity. And, while South Orange and Maplewood, like any other communities, have a long distance to travel to become truly inclusive and nonracist, they are committed to the process that will lead to that result. This means that for black people, South Orange and Maplewood are far more welcoming than most communities in the United States.

Conclusion

African Americans' access to opportunity can best be promoted by looking at the structures that continue to hinder progress. Chief among those structures is the way in which opportunities—for good education, housing, jobs, and wealth creation—have a spatial dimension within regions. Housing segregation has been and continues to be a primary instrument through which black people are denied access to opportunity; most African Americans do not get to live where those opportunities

are richest. Both the private and public housing markets continue to promote segregation.

Integration offers positive opportunities for African Americans to access the opportunity structure in regions in New Jersey and beyond. Over time, whites' attitudes in choosing housing will need to be influenced if segregation is to end. In the meantime, the story of South Orange and Maplewood is replicable in other New Jersey communities whose leaders want to push back against the structures that promote inequality for blacks and other people of color.

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SHATTERED HOPES: PREDATORY LENDING IN THE STATE OF NEW JERSEY

James Crowder and Carlos Gallinar

Predatory lending is not new. Unscrupulous lenders have long provided high-interest loans with unfavorable terms to those not informed about the complexities of borrowing money. The surge in the economy over the last few years brought many new borrowers into the housing market—especially those with moderate incomes and minorities—both groups who traditionally have not had easy access to capital markets. Many mainstream lenders discovered what is called the sub-prime market. The sub-prime market consists of borrowers who may not possess the credit profile (prompt payment of debt, no defaults, and a solid work history) often found with prime borrowers. Through sophisticated "credit scoring," many mainstream lenders and their subsidiaries are able to predict good candidates for credit even with less than sterling credit histories. Other lenders went further into the sub-prime market, often ignoring standard lending practices to "get money out the door" in an exuberant economy. The risk is fairly low. If a borrower defaults, the assets are seized and quickly flipped. Profits are made on high interest loans with onerous covenants that set the stage for default.

Mortgages are not the only place where predatory lenders ply their trade. Many such lenders seek out the elderly who have built equity in their homes for twenty years and beyond. They then offer what are seemingly favorable terms to take out a second mortgage to pay off existing bills or to repair an aging roof or boiler. The unwary homeowner is then surprised to find that significant closing costs, unnecessary and high insurance premiums, and pre-payment penalties are part of the loan package. Many homeowners take the package and soon find that they cannot pay the monthly note. The unscrupulous lenders then take the asset (the home) and quickly sell it. The damage done to the individual, and often the community, is devastating. For these populations, predatory lenders can destroy years of hard-won equity in their houses, which then limits the intergenerational transfer of wealth. Additionally, the quick acquisition and disposition further distorts the housing and capital markets of already distressed urban (and in some cases rural) communities. Community decay is hastened through individual repossession and the "flipping" of houses to the next person who will pay for a house with a high loan-to-value ratio. The cycle ends with abandoned houses and ruined lives. Still other places where predatory lending is prevalent include the following:

Mortgages are not the only place where predatory lenders ply their trade.

- Payday loans
- Check-cashing outlets
- Advance payment of anticipated tax refunds

Payday loans are common in poor rural and urban areas. Typically, check-cashing shops make loans in advance of someone's paycheck—with heavy fees and interest rates. Often the individuals using these check-cashing services are what many call the "unbaked." Because they lack a permanent address or have limited funds to open a bank account, many individuals do not have access to a bank, a credit union, or other mainstream financial institutions. Lenders who offer payment on anticipated tax refunds are a variant on check-cashing outfits and those who offer payday loans. For a heavy processing fee, individuals in low-income communities can get immediate funds, however they often lose up to half of what they would receive in the tax refund—if they waited. The fact that the working poor need to use payday loans, check-cashing services, and other wealth-draining schemes points to a significant need to build a financial infrastructure in poor communities.

The purpose of this paper is to examine the issue of predatory lending. More specifically, the paper analyzes the issue as it pertains to minority communities in New Jersey. Finally, the paper reviews current legislative attempts to curb predatory lending and the role that civil society can play in preventing this unscrupulous practice from destroying communities. The major conclusion is that legislative redress is important, but these practices point to a greater need to improve financial literacy and a larger effort to build community-based financial institutions that provide access to credit and financing for those who most need such services.

Predatory Lending

The predatory lending process is similar to a traditional loan, the difference being that individuals who do not qualify for a conventional mortgage are the prime targets. A typical example of how the process works follows.

> A low income mother, looking to purchase her first home, hears about a "real estate" agency selling homes in her area. The woman is shown a home in good condition and told that the home she will purchase is similar to the one she viewed. In reality, the home she moves into is dilapidated and in bad condition. Nevertheless, she signs a mortgage contract that stipulates [illegible] is told that the repairs to the home will be made within a couple of months after she moves in. The repairs are never made. Six months later the interest rate has increased [illegible] to make the mortgage. She is forced to foreclose on her home. The "real estate" agency whose loans are guaranteed by secondary lenders, makes a profit. The woman is without a home. The home she bought is back on the market. And the neighborhood continues to deteriorate.

The preceding example illustrates how the growth of sub-prime lending in recent years has become both a blessing and a burden to African Americans and Latinos in New Jersey. While increased access to capital has benefited those with imperfect credit ratings, there is a concomitant growth in the damaging aspects of sub-prime lending. Even defining sub-prime lending is problematic.

Sub-prime lending involves loans made to borrowers with damaged credit histories or low credit ratings; interest rates are usually higher in order to offset the risk of lending. Predatory lending is an outgrowth of the sub-prime lending industry but describes the unscrupulous practices of aggressive lenders that seduce borrowers into loans with high interest rates and fees without regard to their ability to pay. Predatory lenders often utilize, among other things, high-pressure sales tactics and fraud, which frequently result in borrowers losing their homes due to foreclosure. Predatory lenders often target vulnerable populations, typically the elderly and or people of color living in poverty stricken urban areas that do not have access to mainstream sources of capital. Several practices, while not exclusive to predatory loans, can make a loan predatory.

Falsifying loan applications—Done by a variety of means such as forgery, backdating, or overstating the borrower's income (Goldstein 1999).

Misrepresented mortgage agreement—The lender leaves an unsigned copy of the mortgage agreement instead of a notarized contract with the borrower. This impedes usage of the mandatory three-day rescission clause to which the borrower is entitled.

Single-premium credit insurance—Unnecessary life insurance that is calculated into the principle, thereby boosting interest payments.

High-pressure sales tactics—The lender may fail to explain the terms of the loan, and the borrower finds a much higher monthly payment is required than was previously expected. In other instances, the lender will reassure the customer that the payment will be reduced or the loan will be refinanced after the initial period (Goldstein 1999).

Obscuring information—Lenders may bury the actual costs of the loan in pages of documentation and discourage the borrower from reading the document (Goldstein 1999).

Flipping—The lender may set up the loan with a high interest rate with the intent to refinance shortly thereafter. Continual refinancing allows the lender to charge fees each time (ACORN 2000).

Unreasonable fees—Fees set above the market rate and unnecessarily attached to the loan. These costs may include the broker's fees, appraisal fee, origination fee and closing cost. A prime loan may carry one point in fees, whereas a typical predatory loan could carry four points or more (Kennelly 2000).

Loans that exceed the borrower's ability to pay—Predatory loans are usually made based on a large amount of equity rather than income, thus increasing the likelihood of foreclosure.

Negative amortization—Repayment of the loan is set up in away that each monthly payment fails to pay off the accrued interest and actually increases the principal balance of the loan. The borrower owes more than was originally borrowed (Saunders 2000).

Steering/referring up—Borrowers who qualify for a prime loan are "steered" to sub-prime lenders or are unfairly disqualified for a prime loan (Saunders 2000).

Deed signing—In particularly [illegible] schemes, lenders convince a homeowner to "temporarily" sign the deed of the property over to them. The promised loan never arrives, and the property has already legally changed hands (Murray 2000).

High interest rates—Rates that are inappropriately high in comparison to a borrower's given credit rating.

Home-improvement contracts—The contractor arranges the loan to pay for home improvements, obtains payments from the lender, and then either does the work poorly or not at all. In many instances, the contractor obtains an additional commission for "arranging" the loan (National Consumer Law Center 1993).

Balloon payments—Large sums of money payable at the conclusion of the loan, that often contain an unenforceable oral promise to refinance. In many instances these payments often equal 85 percent of the principal amount. Approximately 10 percent of sub prime loans have balloon payments. On the national level the most common types of predatory loans are carried out through first-time home mortgages or mortgage refinancing. However, the problem continues to be credit availability for qualified communities of color and low income families. As the Responsible Lending Organization states (2003), "In the US today, it is the type of credit and the terms of that credit that pose the greatest economic threat to hard-working people. Currently, those with the fewest financial resources pay the most to obtain financing."

Payday Loans

Payday loans are a variation of predatory lending. These loans, similar to a cash advance, are offered to individuals with a pressing need for money. A potential borrower need only submit a postdated personal check in order to receive the loan minus the lenders fees. These fees are usually at an exorbitant rate such as 15 or 20 percent. The lender usually holds the personal check until the borrower's next payday. The borrower then has the option of paying back the original amount in exchange for the personal check or allowing the lender to deposit the check. Another option allows the borrower to renew or "roll over" the loan until the next payday, thereby accruing a new set of fees. Payday lenders advertise these loans to their target market, low-income working consumers. Since these loans target consumers in financial crisis, the majority of borrowers cannot repay their loans in full within two weeks. According to an analysis of the North Carolina Banking Commissioner for 1999 and 2000, 90 percent of the lenders' revenues come from borrowers who obtain five or more loans annually. Facts such as these explain how payday loans have become a $3.4 billion industry (Responsible Lending 2003).

Problem in New Jersey

Similar to most other states, New Jersey has experienced proliferation of predatory loans. While the number of predatory lending practices has increased in the last several years, the pervasiveness of predatory lending in New Jersey is difficult to ascertain. The growth of these loans has occurred in the state's urban centers. In particular, Newark, Camden, and Jersey City have been prime locations for vulnerable and disenfranchised residents. Moreover, a national study estimated that New Jersey borrowers account for approximately $295 million a year in predatory loans (New Jersey Institute for Social Justice 2003).

Attempting to curb predatory lending presents a quandary for state legislators. While heightened regulation would alleviate the problem, it would also adversely affect those legitimate businesses engaged in sub-prime lending. In recent years, New Jersey has taken several measures to curtail the practice of predatory lending.

In 2002, the state's attorney general filed a massive suit in Essex County against a network of predatory lenders

The 33-count suit was a sweeping measure in the state's efforts to end the predatory lending market in the state's urban areas (New Jersey Department of Law and Public Safety 2002)

Most recently, the state's legislative body joined other states in the nation, such as North Carolina, by enacting laws to ban predatory lending practices. In May 2003 Governor James McGreevey signed into law the "New Jersey Home Ownership Act of 2002." The law, which took effect November 27, 2003, seeks to curtail the use of predatory lending by providing extended consumer protection.

The legislation is poised to make some necessary changes in the state. According to the New Jersey Institute for Social Justice:

> All told, the statute appears well positioned to do for New Jersey what the equivalent statute in North Carolina did for that state. According to the first comprehensive analysis of the impact of that statute (which served as the model for the New Jersey Act), loans containing predatory terms dropped by [illegible] following its passage, while loans to borrowers with impaired credit actually increased 31%. Especially since 80% of the mort[illegible] loans in New Jersey are originated by lenders which also do business in North Carolina, it is clear that the New Jersey statute is on track to curb predatory lending and maintain access to legitimate sources of credit.
>
> *New Jersey Institute for Social Justice 2003*

New Jersey has other legislation aimed at preventing predatory lending. The state relies on the Home Repair Financing Act, the New Jersey Licensed Lenders Act, the Mortgages on Real Property Act, and the Consumer Fraud Act to protect New Jersey consumers.

Furthermore, state laws on criminal fraud, civil fraud, breach of contract, and civil usury supplement the aforementioned protection. However, NJ has successfully prosecuted only three lenders under this current legislation since 1997 despite the perceived increase in predatory lending practices. This paucity of successful litigation is a result of the federal law that preempts New Jersey regulation of predatory lending.

SUMMARY OF RELEVANT NEW JERSEY LEGISLATION

LEGISLATION	SUMMARY	CONFLICT WITH FEDERAL LEGISLATION	INTERNET LINK
Home Repair Financing Act N [illegible] 5 [illegible] 2[illegible] et seq	Designed to protect unaware co[illegible] from home improvement [illegible] Three day [illegible] clause allows a borrower to cancel the contract [illegible] after signing [illegible] should [illegible]	[illegible] a good loan vs a predatory loan Does not limit the ability of contractors to [illegible] price of goods or loan terms	www [illegible]
New Jersey Licensed Ac[illegible] P.L. 1996 c 157 (C 17 11C-1 et seq	[illegible] were previously [illegible] separately: the Consumer [illegible] Act, [illegible] Mortgage [illegible] Act, Mortgage Bankers and [illegible] Act [illegible] sales [illegible] Retail [illegible] Act. Also bans [illegible] misleading, or deceptive practices [illegible] lending	Only applies to businesses operating solely in New Jersey. Subsidiaries [illegible] operate under the [illegible] Alternative Mortgage [illegible] Parity Act	http [illegible] www.nj.gov/dob/[illegible].htm
Mortgages on Real Property Act N [illegible] S 46 [illegible] et seq	Allows mortgage pre-payment at any time without penalty	While the CFA is currently used by victims of predatory lending to obtain damages and attorney's fees, [illegible] ineffective [illegible] to prevent future complaints	
Consumer Fraud Act (CFA) N [illegible] S 56 8-2 et seq	[illegible] against [illegible] fraud [illegible] practices in the sale or advertisement of merchandise		[illegible] www.state.nj.us/[illegible]

Policy Recommendations

Regulation of predatory lenders is a significant first step in limiting the damage to communities and individuals. This is only the first step and in New Jersey (and in other places), it is a hard-won step. New Jersey's predatory lending law was recently scaled back under pressure from the banking and financial communities, which see regulation of predatory lenders in the state as a possible encroachment on their ability to do legitimate business and offer credit to underserved communities.

It is important for the state's communities of color to see the issue of predatory lending not only as a problem but also an opportunity to address two significant issues: (1) financial literacy and (2) the acquisition and preservation of assets. Government can be helpful in addressing both financial literacy and asset building, but ultimately civil society, especially in affected communities, must embrace the challenge of not only limiting predatory lending, but also building a strong structure of financial knowledge and asset development in vulnerable communities. It is with this in mind that we make the following recommendations.

Financial Literacy

Through private sector, state, and local funding increase the support and efficacy of financial education and literacy programs designed to educate targeted populations. There are many programs sponsored by the financial services industry and consumer protection groups to help educate consumers. These programs, while good, do not fill the need for a multi-layered, multi-pronged approach to financial literacy. A significant effort is needed that [illegible] faith institutions, and community-based service and development organizations.

Asset Preservation Collaboration I

Stakeholders should establish a predatory lending and asset preservation collaborative. The asset preservation collaboration should work with existing efforts and organizations, such as the Association of Community Organizations for Reform Now (ACORN), American Association of Retired Persons (AARP), Citizen Action of New Jersey, and the New Jersey Institute for Social Justice to educate the public on the problems associated with predatory lending. There are many efforts addressing predatory lending, but they need to increase their level of coordination and [illegible] community groups and organizations such as the National Association for the Advancement of Colored People (NAACP), the Urban Leagues, the Black Ministers Council, the Housing Directors Association, the Latino Leadership Alliance of New Jersey, the Regional Equity Coalition, and the Housing and Affordable Network of New Jersey. Such a partnership should form the basis for an ongoing Asset-Preservation Collaboration to attract national and local capital for asset preservation and technical assistance.

Asset Preservation Collaboration II

Use existing community development organizations and intermediaries to increase the availability of capital for household repairs and debt. Predatory lenders thrive in part because they can quickly step in and help vulnerable populations in time of need. A boiler that breaks down, or a roof that needs replacing can stretch a resident's budget to the breaking point. Traditional banks cannot respond to such crises in a timely fashion. Many communities are experimenting with dedicated loan pools housed at community-based intermediaries (with the capacity to do loan underwriting) that can respond to life emergencies related to homeownership.

The loan funds can arrange financing through subsidized loans at favorable terms. These experimental loan funds use standard and flexible criteria such as an individual's reputation in the community for loans. Another mechanism for delivering customized capital is the community development credit union. Community development credit unions have not made significant inroads in New Jersey but are poised to improve access to capital in low- and moderate-income communities. Typically, community development credit unions are organized by a community development corporation (CDC), faith institution, or any organization whose mission is community self help and development. Community development credit unions act as banks for the "unbanked" in distressed communities. Many have developed the expertise and capacity to work with at-risk borrowers

and those with capital needs that traditional banks cannot meet. The Asset-Preservation Collaboration should work with national organizations such as the National Federation of Community Development Credit Unions to increase awareness and use of community development credit unions in New Jersey.

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574 Newark Avenue #204
Jersey City, NJ 07306
201-222-1199
www.acorn.org

Citizen Action
400 Main Street, 2nd Floor
Hackensack, NJ 0760[illegible]
201-488-2804

Consumers League of New Jersey
60 South Fullerton Avenue
Montclair, NJ 07042
973-744-6449
[illegible]

National Federation of Community Development Credit Unions
120 Wall St
New York, NY [illegible]0005
2[illegible]2-809-1850
www.natfed.org

New Jersey Department of Law and Public Safety,
Division of Consumer Affairs
P.O. Box 45027
Newark, NJ 07101
973-504-6200
[illegible] htm

New Jersey Institute for Social Justice
[illegible]
[illegible]
Newark, NJ 07102
973-624-[illegible]400
www.njisj.org

Responsible Lending Organization
P.O. Box [illegible]
Durham, NC 27702-3638
919-3[illegible]3-8500
www.responsiblelending.org

U.S. Department of Housing and Urban Development Philadelphia Homeownership Center
The Wanamaker Building
[illegible]00 Penn Square East
Philadelphia, PA 19107-3389
800-440-8647

AN INTERVIEW WITH ATTORNEY GENERAL PETER C. HARVEY

Conducted by Dr. Roland V. Anglin
New Jersey Public Policy Research Institute

NJPPRI: *Attorney General Harvey, coming to the position, did you bring a set of agenda items that you wanted to accomplish?*

Attorney General Harvey: In large part, my agenda was informed by my previous position as first assistant attorney general and director of the Division of Criminal Justice Enforcement and Coordination. The division, while composed of hardworking attorneys, often worked in silos, and investigations took a long time to reach closure. I reorganized and streamlined the division to address issues such as consumer fraud, organized crime, gang crime, and crimes against the elderly. In 2002, the division obtained indictments/accusations by 109 from 2001 and prosecuted 126 more defendants. In fact, we charged and convicted more defendants in 2002 than in each of the prior five years in the division. In 2003, we again increased our indictments and convictions.

NJPPRI: *Crimes against the environment, could you elaborate?*

Attorney General Harvey: We have sued companies, when we could trace them, who dumped chromium waste in Jersey City. In Camden, we have aggressively prosecuted those who illegally dump garbage in the city; we have also used the state police to enforce rules against heavy haulers using local roads. These heavy haulers disrupt the life of community residents and destroy local infrastructure. In 2003, the Environmental Crimes Bureau obtained 20 indictments/accusations, resulting in 10 years' jail time and $342,000 in fines and restitution.

NJPPRI: *Apart from crimes against the environment, you have directed much attention to Camden; this interest seems out of context to the duties and role of the Attorney General's Office.*

Attorney General Harvey: Not true. First, you have to frame the context, the citizens of Camden deserve the full protection of the state's constitution. What we have done is to say that Camden residents, like any other citizens of New Jersey, deserve the security of going outside their home, going to the local park, and not feeling threatened by drug dealers. Therefore, in Camden, we have targeted certain parks, and, for a period, we put in place a complement of state police to show our determination to take back those public spaces. When neighbors feel secure, the community flourishes, economic development comes back, and this contributes to the overall prosperity of Camden. Let me also say that just putting the state police in a community will not stop the sale of drugs or the presence of gangs. We collaborated with many other state and local agencies to provide alternatives to youth in not only Camden, but also other cities such as Newark.

NJPPRI: *You mentioned gangs. They seem to be prevalent in many communities, not just in urban areas, but increasingly in suburban areas; what can be done to curb their influence and activity?*

Attorney General Harvey: Gang activity in New Jersey is emblematic of what is happening across the country. We know that gangs provide structure and security to young people who come from family circumstances without caring and structure. I should say that historically gangs have always offered such structure, the new change and one that is important here is that many contemporary gangs are essentially organized crime. The supergangs now have offshoots all over the country that are flocking in drugs, guns, and other illegal activity. Forceful prosecution is the first step in limiting the influence of gangs, and we are working with the state police gang unit [and] local authorities to infiltrate and stop their operations. We cannot forget that there are varying levels of gang influence, and we must reclaim those young people that want to pursue alternatives. That is why the work of the [Governor's] Council on [illegible]

We know that gangs provide structure and security to young people who come from family circumstances without caring and structure.

agency that reports to me, has embarked on a course of prevention and managed reentry into the community for ex[illegible]e offenders. Working with faith-based agencies, workforce preparation agencies, and counseling organizations, we are trying to prevent youth from first getting involved in gang activity, but if they do and are caught, prevent them from becoming career offenders.

NJPPRI: *One important policy area that has gone neglected over the past few years is fair and open housing. Is this a policy area that is important to your tenure as AG?*

Attorney General Harvey: Open housing is important, but I am concerned with all violations of civil rights. We have opened a mobile office in Hudson County to process discrimination complaints and to serve as a resource for civil rights–related information. The new office is located in the center of a diverse community including significant Arab American and Muslim American populations. We want everyone to understand that despite the horrific events of September 11 and our present involvement in Iraq, we will not tolerate the abridgment of civil rights to the Islamic community in New Jersey.

Second, I have empowered of Office of Bias Crimes and Community Relations to pursue bias crimes in the twenty-one counties even when these cases are not high on the agenda of local county prosecutors. We simply will not tolerate civil rights abuses and bias crime of [illegible]ny kind.

Directly to your question, we have pursued both property owners and real estate agencies that practice housing discrimination. We have met with some success, but we can always to do more in this area. Another place that we have pursued discrimination is in the area of access to facilities. It might seem shocking, but there are still places in this state that restrict entrance and use of facilities, such as nightclubs, based on race. This is intolerable.

For example, in Mercer County we sued landlords and property managers who refused to rent to African Americans while telling whites that apartments were available. We also filed the state's first ever civil case brought under a new state law that prohibits housing discrimination on the basis of Section 8 and other lawful sources of a tenant's income.

NJPPRI: *Prosecution of fraud seems to be high on your agenda, why?*

Attorney General Harvey: Fraud, be it Medicare abuse, identity theft, or insurance fraud, costs the New Jersey taxpayer untold millions. We have spent a considerable amount of time trying to reform laws to help those victimized by identity theft. When someone's identity is stolen and his or her credit stained, it is tough to regain your credit worthiness. We are prosecuting those involved with identity theft, but we are also working with various state agencies and the credit rating industry to streamline the process for victims to repair their credit.

In December 2003, the Coalition Against Insurance Fraud—a national organization of insurers, law enforcement agencies, and consumer groups based in Washington, D.C.—named New Jersey first in the nation in prosecuting civil and criminal insurance fraud cases. Annually, 86 percent of the nation's civil fraud cases are brought by our office, and we collected, in 2003, criminal fines and penalties totaling $16 million.

NJPPRI: *As you know, the state police have been accused of racial profiling in the past. What has been done to eliminate such bias from the force?*

Attorney General Harvey: First, we are complying with the consent decree, but, more importantly, we have put in place programs to train new and existing officers that profiling is not policy. We have also stepped up our efforts to promote qualified women, Asians, and African Americans on the force. Our hope is that a diverse senior leadership will change the culture of the state police over time making it more responsive to all communities. Right now, 24 percent of the state police's command staff (cap-

tains, majors, lieutenants, and colonels) is minority, and when women are added the total is over 30 percent

NJPPRI: *Thank you, Attorney General Harvey, for taking the time to answer our questions.*

Attorney General Harvey: My pleasure.

ROLAND V. ANGLIN

Roland Anglin is Executive Director of the New Jersey Public Policy Institute. Previously he has been Senior Vice President at the Structured Employment Economic Development Corporation (SEEDCO), a national community development intermediary. Prior to that position, Dr. Anglin was Deputy Director of the Ford Foundation's Community Resource Development Unit, which seeks to help asset-poor communities in the revitalization process. Dr. Anglin has written a number of scholarly articles on regional and community development.

JAMES A. CROWDER, JR.

James Crowder is a Program Consultant at the Drug Policy Alliance, a nonprofit organization dedicated to reforming the racist and fiscally irresponsible drug policies that are currently tearing apart communities of color across the country. He received his Bachelor of Arts in Communications and African American Studies from Rutgers College and will receive his Master of Public Policy in May 2005 from the Edward J. Bloustein School of Planning and Public Policy, both at Rutgers University, New Brunswick. He also received a Master of Arts in African American Studies from Columbia University in New York.

CARLOS GALLINAR

Carlos Gallinar is a community planner at Isles, Inc., an environmental and community development organization in Trenton, New Jersey. At Isles, Carlos works on several neighborhood-based and participatory planning initiatives. Carlos brings to this work over five years of community development and neighborhood planning experience. This includes his experience working along the Texas-Mexico border on several local and international projects with the El Paso Community Foundation.

Carlos holds a Bachelor of Arts degree from the University of Texas-El Paso and a Master's in City and Regional Planning degree from the Edward J. Bloustein School of Planning and Public Policy at Rutgers University. He currently lives in South Jersey.

ATTORNEY GENERAL PETER C. HARVEY

Peter C. Harvey was confirmed by the Senate as Attorney General on June 16, 2003. By virtue of his actions and accomplishments, he was named Lawyer of the Year for 2003 by the *New Jersey Law Journal*. It is the first time the *Law Journal* has bestowed the honor upon any member of the bar. Attorney General Harvey serves as representative of the National Association of Attorneys General (NAAG) to the Executive Working Group for Federal-State-Local Prosecutorial Relations. The Executive Working Group includes Attorneys General, District Attorneys, and representatives of the U.S. Department of Justice. Its principal mission is to encourage and enhance federal, state, and local law enforcement initiatives. In addition to his role with the Executive Working Group, Harvey serves as Chairman of the NAAG Subcommittee on Gang Violence, and as Vice-Chairman of NAAG's Homeland Security Committee. He is also a member of the NAAG Corporate Responsibility and Securities Working Group. Prior to his confirmation in June, Mr. Harvey had served as Acting Attorney General since February 15, 2003. Previously, he had served as First Assistant Attorney General and Director of the Division of Criminal Justice, having been appointed to both positions by Attorney General David Samson on January 17, 2002.

During his career, Mr. Harvey has served as an Assistant United States Attorney for the District of New Jersey (1986-1989), where he prosecuted cases involving organized crime, narcotics, bank robbery, credit fraud, and child pornography. He also served as a Special Assistant to the New Jersey Attorney General (1989-1990), where he was the principal drafter of New Jersey's assault firearms law. Mr. Harvey has been a mediator for the United States District Court in New Jersey and for the New Jersey Superior Court. He also has served on the Lawyers' Advisory Committee to both the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

Mr. Harvey was a law clerk for the Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey. He was also a partner at Riker, Danzig, Scherer, Hyland and Perretti, LLP, in Morristown, New Jersey, where he practiced principally in the areas of commercial litigation, internal corporate investigations, and criminal defense in federal and state courts. Mr. Harvey represented businesses and individuals in a variety of cases including banking, trademark, copyright and reinsurance matters.

A resident of Somerset County, Mr. Harvey received his law degree from the Columbia University School of Law in 1982, and his Bachelor of Arts degree in Political Science from Morgan State University in 1979. He was admitted to the New Jersey Bar in 1989, the New York Bar in 1984, and the District of Columbia Bar in 1985.

KEVIN D. WALSH, ESQ.

Kevin D. Walsh is the Associate Director of Fair Share Housing Center, a nonprofit legal and policy center founded in 1975 to advance and protect the *Mount Laurel* doctrine. A graduate of Rutgers School of Law in Camden, Kevin joined the Center in 2000 following a clerkship with Associate Justice Gary S. Stein of the New Jersey Supreme Court.

Under the direction of Peter J. O'Connor, Fair Share Housing Center has long been involved in litigation challenging exclusionary zoning in New Jersey, one of the most racially and economically segregated states in the nation. Appearing on behalf of the Center and the Southern Burlington and Camden County branches of the NAACP, Kevin argued before the New Jersey Supreme Court in 2002. That appeal resulted in a unanimous decision of the court that ultimately forced the developer of the former Garden State Racetrack to provide 285 units of affordable housing in Cherry Hill. The court's decision curtailed the ability of developers and municipalities to pay their way out of providing affordable housing in areas of high opportunity. Overall, the litigation will result in an additional 700 units of housing in a community that would not have provided affordable housing without the Center's intervention.

In December 2004, the Center negotiated a settlement in litigation against Woolwich Township, a Gloucester County municipality that, according to recent census data, is the fastest growing municipality on the East Coast. That settlement will provide a nonprofit designated by the Center with land and $2.5 million to subsidize a 100-unit affordable housing development in a growing municipality that presently has no *Mount Laurel* housing.

The Center is a frequent litigant and amicus curiae in matters involving state housing law and policy. The Center is currently involved in litigation against the Council on Affordable Housing and New Jersey Housing and Mortgage Finance Agency involving those agencies' failure to promote racial and economic integration as part of Third Round of affordable housing compliance, a period extending from 2000 to 2014. In Spring 2004, the Center challenged the Meadowlands Commission's Master Plan for its failure to include affordable housing as part of the redevelopment of the Meadowlands.

Kevin has brought several Open Public Records Act cases seeking access to state records, including two that resulted in published Appellate Division opinions. He appeared before the New Jersey Supreme Court in February 2005 in the first appeal to reach the court that involves fee shifting and the Open Public Records Act.

In addition to his work with the Center, Kevin is counsel to New Jerseyans for Alternatives to the Death Penalty (NJADP). He is representing that group in litigation that has placed a moratorium on executions in New Jersey. He also works with the Pennsauken Stable Integration Governing Board and is a member of the Board of Catholic Charities of the Camden Diocese.

KEN ZIMMERMAN

Ken Zimmerman is the founding Executive Director of the Newark-based New Jersey Institute for Social Justice, an urban advocacy and research organization involved

in challenging barriers that prevent New Jersey's urban areas and residents from achieving their potential. Under his direction, the Institute has focused upon significant policy reform and program development in areas ranging from the creation of jobs for urban residents in major construction projects to criminal justice policy reform related to the more than 70,000 individuals who will be returning from state prison to their New Jersey communities in the next five years. Committed to realizing concrete and tangible solutions, the Institute uses a range of tools, including demonstration projects, applied research, advocacy (including litigation when appropriate) and public education.

The Institute's accomplishments include a path-breaking construction training program that has enabled almost 100 Newark residents to enter the construction trade unions and is being used as a model by the state for up to $30 million to replicate it statewide; the first appellate court decision in the country recognizing that predatory lending violates federal and state civil rights laws, as well as publication of a pivotal report that led to the state's anti-predatory-lending legislation, and a nationally recognized convening around prisoner reentry cochaired by former Attorney General John Farmer and former Public Advocated Stanley Van Ness that led New Jersey to be one of seven states to be designated by the National Governors Association as a demonstration site.

Ken brings to this work extensive civil rights and community development advocacy experience, as well as substantial insight into public-sector reform based on his experience within government. Prior to becoming the founding Executive Director of the Institute, Ken worked on the national level as a civil rights policymaker and litigator, most recently as a Deputy Assistant Secretary for Enforcement and Programs in HUD's Office of Fair Housing and Equal Opportunity. Other experience include seven years as a Senior Trial Attorney with the United States Department of Justice's Civil Rights Division, focusing on housing and lending discrimination cases, and work as a Legal Services lawyer in Oakland, California, and Washington, D.C. Ken is a magna cum laude graduate of Yale College and Harvard Law School.

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